92-1568

MAR 4 1993

NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1992

ERMA L. ABAD,

Petitioner

versus

KRAFT, INC. and

CHARLES H. DIAL,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
GEORGIA DECISION

Arthur C. Nilsen
COUNSEL FOR PETITIONER
JONAP & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033
(404) 320 - 6000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Constitution of the State of Georgia of 1983 is unconstitutional as it sets out in the Preamble, to perpetuate the principles of free government and to promote the interests and happiness of the citizens of the state of Georgia without mention of its being subsidiary to the Constitution of the United States and specifically to the Fourteenth Amendment thereof, and further lacking in any statements as to the powers of the state being set out and given thereto by the Constitution of the United States.

2. Does the actions and enforcement of the Constitution of the State of Georgia of 1983, by the Supreme Court of the State of Georgia, by reversing the decision of the Court of Appeals of the

State of Georgia in the instant case involving the diversity of citizens, ie. the Petitioner a resident of New York, and in view of the Preamble to the Constitution of the State of Georgia of 1983, then show greater flagrant emphasis by said court to the reading of Article 1, S 1, P 1, of the Constitution of the State of Georgia of 1983, as to protection to persons and property of Georgia being the paramount duty of the government of Georgia, to which the court is sworn, thus depriving the Petitioner the right of the equal protection of the Fourteenth Amendment of the Constitution of the United States?

3. Whether the Georgia Supreme Court in reversing the Georgia Court of Appeals and affirming the trial court's actions, exceeded their discretion as to the

requirements and permissive discretion of the Official Code of Georgia Annotated Sections: 9-11-38, 9-11-39, 9-11-41(b), and "The Uniform Superior Court Rules" of the State of Georgia, Rules 8.4 and 14, and deprived the Petitioner of the protection of the United States Constitution as to: due process, the right to a trial by jury, and equal protection as to diversity of citizenship, where the record reflected that the trial Judge, called the case, with knowledge of the lack of notice and/or communication with the Petitioner's lawyer as to the actual time for the case to be called but, with the Court's notice of the need for at least 24 - 36 hour advance notice to the Petitioner to permit her to travel to the court in Georgia from the State of New York, her residence, and where the trial

judge, in the absence of the Petitioner or her lawyer, acted and struck the Petitioner's demand for a trial by jury upon motion of the Respondents and then after hearing and considering evidence presented solely by the Respondents entered a judgment finding for the Respondents.

LIST OF ALL PARTIES

Petitioner:

Erma L. Abad

Represented By:

Arthur C. Nilsen
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033

Respondents:

Kraft, Inc.

Represented By:

Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

Charles H. Dial

Represented By:

Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

As 28 U.S.C. s 2403(b) may be applicable:

The State of Georgia

Represented By:

Michael J. Bowers
Attorney General
- State of Georgia
132 State Judicial Building
42 Capital Square, S.W.
Atlanta, Georgia 30334

TABLE OF CONTENTS

		PAGE
I.	Questions Presented for Review	(i)
II.	List of All Parties	(v)
III.	Table of Contents	(vii)
IV.	Table of Authorities	(viii)
V.	Official Report of Case	(ix)
VI.	Statement of Jurisdiction	2
VII.	Statement of the Case	3
VIII.	Argument for Allowance of Writ.	21
IX.	Conclusion	24
X.	Appendix	a

TABLE OF AUTHORITIES

Amendment 5 to the Constitution of the United States.....Appendix Page v

Amendment 7 to the Constitution of the United States.....Appendix Page v

Amendment 14, Section 1, to the Constitution of the United States
Appendix Page w

The Preamble to the Constitution of the State of Georgia of 1983.Appendix Page x

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983
Appendix Page x

Article 1, S 1, P 2 of the Constitution of the State of Georgia of 1983
Appendix Page x

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia 1983
Appendix Page y

Official Code of Georgia Annotated, Section 9-11-38.....Appendix Page z

Official Code of Georgia Annotated, Section 9-11-39.....Appendix Page z

Official Code of Georgia Annotated, Section 9-11-41 (b).....Appendix Page zz

Uniform Superior Court Rules, of the State of Georgia, Rule 8.4
Appendix Page zzz

Uniform Superior Court Rules, of the State of Georgia, Rule 14
Appendix Page zzzz

The pertinent text of the above listed constitutional provisions, statutes and regulations involved in this case, are set out verbatim in the appendix.

OFFICIAL REPORTS OF CASE

State Court of Fulton County, State of Georgia, civil Action File No. 134012, Erma L. Abad vs. Kraft, Inc. and Charles H. Dial.....Appendix Page a

The Court of Appeals of the State of Georgia, Case No.: A91A1084, Erma L. Abad vs. Kraft, Inc. and Charles H. Dial, 201 Ga.App. 523, 411 S.E.2d 500
Appendix Page g

The Supreme Court of the State of Georgia, Case No.: S92C0189, Kraft, Inc. and Charles H. Dial v. Erma L. Abad, 417 S.E.2d 317 (Ga. 1992)...Appendix Page l

Kraft v. Abad, 262 Ga. 336 (1992)

No. _____

IN THE SUPREME COURT OF

UNITED STATES

October Term, 1992

ERMA L. ABAD, Petitioner,

v.

KRAFT, INC. and

CHARLES H. DIAL, Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
GEORGIA DECISION

Petitioner Erma L. Abad prays that a writ of certiorari issue to review judgement of the Supreme Court of the State of Georgia, entered on June 23rd, 1992 and upon which the Motion for Reconsideration was denied on December 4th, 1992, by the Supreme Court of the State of Georgia.

STATEMENT OF JURISDICTION

The jurisdiction of this Court, comes forward from the decision of the State of Georgia's court of last resort, the State of Georgia Supreme Court, which, on reconsideration, on December 4th, 1992, affirmed its decision of June 23rd, 1992 and denied the Petitioner's Motion For Reconsideration and thereafter transmitted to the trial court the remittitur.

Further, wherein said court of last resort, the Supreme Court, of the State of Georgia, by its actions has decided an important question of federal law which has not been decided by this Court, and may in fact conflict with applicable decisions of this Court, as to the constitutionality of its state constitution in conflict with the

Constitution of the United States and/or application, interpretation, and/or implementation of its state constitution contrary to established federal law, and the United States Constitution thus jurisdictional ground for this Court is established.

STATEMENT OF THE CASE

This petition for Writ of Certiorari arises out of a motor vehicle collision which occurred on May 27th, 1985, and involved a pickup truck operated by the Petitioner and a tractor trailer operated by the Respondents.

The Petitioner filed her Complaint on July 11th, 1986. Respondents were served with the Summons and Complaint and answered in due course. Discovery was accomplished and the case was ready for trial.

The case appeared on a two week trial calendar beginning July 17th, 1990, Position 11. Counsel for Petitioner at the time of notice, William A. Dinges, issued a letter to the Honorable Nick G. Lambros with copies to the attorneys of

record for the Respondents, advising all parties of the Petitioner's residence, New York State, medical condition and requested a thirty-six (36) hour notice, to provide sufficient travel time. The case was not reached.

The case next appeared on a trial calendar for the weeks of November 5th and 12th, 1990, Position 5. Counsel for the Petitioner at the time of notice, William A. Dinges, issued a letter to the Honorable Nick G. Lambros with copies to the attorneys of record for the Respondents, once again advising all parties of the Petitioner's residence, New York State, and requested a thirty-six (36) hour notice, to provide sufficient travel time. Such notice having been requested, and apparently granted, for prior trial calendars.

The suit came forward for trial on Election Day, Tuesday, November 6th, 1990, when the judge's calendar clerk attempted to notify the Petitioner's attorney at 12:20 P.M., that the judge planned to call the case, that day at 1:30 P.M. The Petitioner and her attorney, having not received the notification personally, were not present at 1:30 P.M. The Trial Court called the case and moved forward in the absence of the Petitioner or her attorney, despite the calendar clerk not having reached the Petitioner or her attorney, to give them reasonable notice to appear. The Trial Judge struck the Petitioner's demand for a jury trial upon motion by the Respondents. The judge having called the case, the Petitioner having failed to put up evidence to prove the elements of its case, due to a lack of reasonable notice

and thus being absent from the court, had the Respondents put up evidence, and after, "hearing & considering evidence offered by the Defendants, the Court hereby enters a judgement in favor of the Defendants with Costs cast upon the Plaintiffs.", at 1:35 P.M. and entered a judgment in favor of the Respondents. The judgment was recorded by the Clerk of the Court by stamp, at 1:54 P.M.

The Petitioner filed a Motion to Vacate Judgment on November 12th, 1990, citing O.C.G.A. 9-11-41 (b) and U.S.C.R. 14 with accompanying affidavit (see appendix page a).

The trial judge denied the Respondent's Motion.

The Petitioner filed an appeal to the Appeals Court of the State of

Georgia, based on its interpretation of O.C.G.A. 9-11-41(b) and U.S.C.R. 8.4.

The Court of Appeals of the State of Georgia found in favor of the Petitioner, reversing the trial court, while not addressing the Petitioner's enumeration of error as to the trial court's error in striking her demand for a jury trial. (see appendix page g).

The Court of Appeals found that O.C.G.A. 9-11-41 (b) was controling in as much as the trial court could only find that the Petitioner and attorney did not make an appearance, amounting to a failure to prosecute the case. O.C.G.A. 9-11-41 (b) only gives the trial court the authority to dismiss the case.

The Respondents on September 16th, 1991, filed a Motion For Hearing with the

Court of Appeals. In their brief which accompanied their motion, the Respondents raised the issue of, "...disparate treatment between litigants resulting from its decision. Article I, Section I, Paragraph II of the Constitution of the State of Georgia of 1983 proclaimed:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the protection of the laws.

Further, the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall 'deny any person'the equal protection of the laws.

The Supreme Court has recently stated that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal

Constitution. Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991)" 402 S.E.2d 269 (1991) "(citing Colonial Pipeline v. Brown, 258 Ga. 115, 365 S.E.2d 827 (1988)."

Thus raising the issues presented by the first and second questions propounded by this Petition for Writ of Certiorari.

On October 16th, 1991, the Court of Appeals denied the Respondents' Motion for Reconsideration.

On November 1st, 1991, the Respondents filed a Petition for Certiorari to the Supreme Court of the State of Georgia, stating that they, "Petition this Honorable Court for Certiorari showing the Court that the Court of Appeals' Decision dated September 3, 1991, presents issues of

great concern, gravity and importance to the public."

The Respondents once again raised the question as to the the Georgia Supreme Court finding that, ". . . the Georgia Constitution offers Georgia citizens greater rights and more benefits than the Federal Constitution."

On November 27th, 1991, the Supreme Court of the State of Georgia denied Certiorari to the Respondents.

On December 9th, 1991, the Respondents filed their Motion For Reconsideration of their Motion For A Writ For Certiorari to the Supreme Court of the State of Georgia. The Respondents once again stated that their issue was one of great concern, gravity and public importance, in that, should the Court of

Appeals decision stand, it would affect all future litigants. It was presented by the Respondents, that the question of equal protection of the laws, as, ". . . a right guaranteed by Article 1, Section 1 of the Georgia Constitution. This Honorable Court emphasized that the Georgia Constitution -- as compared to the federal constitution -- affords greater rights and benefits to the citizens of our State. . ."

The three questions of the Petitioner's Petition For Writ of Certiorari, to this Honorable Court, are presented in the Respondents' continued statements in their Motion For Reconsideration to the Georgia Supreme Court, as shown by their statements on page three of their motion, "Most litigants, both plaintiffs and

defendants, are citizens of the State of Georgia and as citizens they are entitled to protection to person and property and the paramount duty of government which is to be impartial and complete. Article 1, Section 1, Paragraph 2 of the Constitution of the State of Georgia of 1983."

On December 20th, 1991, the Clerk's Office, Supreme Court of Georgia, issued notice to the parties that, "The Supreme Court today granted the writ of certiorari in this case. All the Justices concur, except Weltner, Benham and Fletcher, JJ., who dissent. THIS CASE WILL BE ASSIGNED TO THE February 1992, ORAL ARGUMENT CALENDAR. The Court is particularly concerned with the following: Whether the opinion of the Court of Appeals operates to deny

petitioners due process and equal protection of law."

The Respondents filed their brief with the Georgia Supreme Court, and recited their constitutional issues and further addressed question three of this Petition For Writ of Certiorari as to their interpretation of the appropriate codes and rules adding emphasis to the trial court's right to preserve and enforce order.

The Petitioner filed her brief with the Georgia Supreme Court, of whose judgment is sought herein to be reviewed by this Honorable Court. The Petitioner first raised the question as to the trial court's error in striking her demand for a jury trial, without express waiver as required by O.C.G.A. s 9-11-39, and showing the Court of Appeals stance that

the only discretion based on the facts that the trial court had was to dismiss the case without prejudice.

The Petitioner next addressed the Respondents' question of denial of "equal protection and due process of law" as citizens of the State of Georgia, and stated that the true question was one of denial by the trial court of the Petitioner's right to equal protection and due process of law between litigants.

The petitioner on page 8 of her brief addressed both questions one and two of this Petition For Writ Of Certiorari as to the Preamble, Article 1, S 1, P 1 and P 2 of the Georgia Constitution of 1983, and the introduction of the question as to the actions of the Georgia Supreme Court as to a "mind set" being argued by the

Respondents as to the citizens of Georgia.

The question of abuse of discretion by the trial court was raised by the Petitioner, in reminding the Georgia Supreme Court of their statement, "It should be remembered that an order of dismissal for failure to prosecute is discretionary and is subject to appellate review for abuse of discretion. 9 Wright & Miller, Federal Practice and Procedure: Civil, p. 203, S 2370; 5 Moore's Federal Practice 1125, p. 41.11(2), Spyropoulos v. Linard Estate, 255 S.E.2d 40, 243 Ga. 518 (1979). A dismissal with prejudice for failure to prosecute should not be based solely on absence but on ALL the circumstances of the case. See Link v. Wabash R. Co., 370 U.S. 626, 634-635, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)."

The Petitioner then presented the question of balance as to the parties before the court and the question of disparity as to the question of application of the state and federal constitutions as to equal protection and due process.

On June 23rd, 1992, the Supreme Court of the State of Georgia, reversed the Court of Appeals, not reaching the issue of the striking of the jury demand nor the question of due process or equal protection but, rather retreated to the point that a trial court may go forward with the setting of another trial date, or alternatively, the court may go forward with the trial of the case as was done. The judgment was then deemed to be that of any other judgment. (see appendix page 1)

There was a dissent issued which strongly supported the position of the Court of Appeals.

On July 2nd, 1992, the Peitioner filed a Motion For Reconsideration with the Supreme court of Georgia. Based on the actions of the Supreme Court in its decision, the Petitioner cited specifically that the Supreme Court of Georgia had misconstrued and/or misapplied not only O.C.G.A. 9-11-1, O.C.G.A. 9-11-38, O.C.G.A. 9-11-39 (a), O.C.G.A. 9-11-41 (b), Article 1, Section 1, Paragraph 11 of the Constitution of the State of Georgia of 1983 but, also The Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

The Petitioner emphasized the "lost factor", that the trial court had struck

the Petitioner's demand for a trial by jury without waiver or statutory or constitutional grounds. Emphasis was further placed on the denial of equal protection to all future litigants and the risk of said future litigants "losing their right to a trial by jury as guaranteed by the constitutions of the United States and the State of Georgia." (page five of Petitioner's Motion) In conclusion the Petitioner stated, "The Honorable Court risks sending a loud and clear message that the rights of the trial court to control its calendar exceed the rights of the individual to the basic common law right to a trial by jury."

The Respondents filed a Reply And Opposition To Motion For Reconsideration, as to the question of the waiver of the

jury demand, and stated on page three of their motion, "Even assuming arguendo, that the trial court erred in striking the Appellee's demand for jury trial, it was harmless error." No further issues or new presentations were made.

On December 4th, 1992, the Georgia Supreme Court denied the Petitioner's Motion of Reconsideration thru and to the Court of Appeals of Georgia and affirmed its decision of June 23rd, 1992 and thereafter transmitted to the trial court the remittitur. see appendix page s)

ARGUMENT FOR ALLOWANCE OF WRIT

This is a case involving the diversity of citizenship of the parties. While this case originated in a state court, the rights of all citizens of the United States are guaranteed by the United States Constitution yet those of the Petitioner were abridged.

Proper notice of and opportunity to present her case in the trial court was not afforded the Petitioner, while the trial court had full knowledge of her diversity of residence, that being a resident of the State of New York, while the trial court sat in session in the State of Georgia.

The Petitioner's right to a trial by jury, was arbitrarily torn from her by the trial judge, contrary to

constitutional and statutory mandates.

The judicial review of the trial court's actions was tainted by the reading of the Constitution of the State of Georgia 1983, giving greater weight to the citizens of the state over those citizens of other states, coupled with the judicial record of and statements therein by the court of last resort for the State of Georgia, the Georgia Supreme Court, thus depriving the Petitioner of her United States Constitutional rights as a citizen, to equal protection, due process of law and protection of her property rights, sought to be addressed by the court action as a plaintiff against the Respondents for a motor vehicle collision in which the Petitioner was injured and lost personal property.

The State of Georgia, court of last resort has stated, "that the Georgia Constitution offers Georgia citizens greater rights and even more benefits than the Federal Constitution." Denton v. Conway Express, Inc., No. S90A1101 (March 15, 1991) 402 S.E.2d 269 (1991). The actions of the Georgia Supreme Court, in its ruling on this case shows it to be once again following the authority and/or its own interpretation of its state constitution versus the dictates of the United States Constitution as to state rights and the rights of all citizens of the United States, and thus establishing lesser rights for noncitizens of the State of Georgia in its court. The Georgia Constitution wanes in its power and authority to the Fourteenth Amendment to the United States Constitution and as such this case is ripe for judicial

review by this Honorable Court to the questions of conflict of authority and subsequent decisions.

CONCLUSION

For the reasons stated, the writ should be granted and the judgement of the Supreme Court of the State of Georgia should be reversed and the case remanded to the trial court for a jury trial.

Date this 2nd day of March, 1993.

Respectfully submitted,

Jonap & Associates, P.C.

Arthur C. Nilsen
Counsel for Petitioner
Erma L. Abad

APPENDIX

Erma L. Abad

v. Civil Action
134012

Kraft, Inc. & Charles H. Dial

Judgement

The case having come on for trial with notice to all parties, the Court having struck the demand for jury trial upon motion by Defendants, the Court having called the case, the Plaintiff having failed to put up evidence to prove the elements of its case, the Court after hearing & considering evidence offered by the Defendants, the Court hereby enters Judgement in favor of the Defendants with Costs cast upon Plaintiffs.

This 6th day of November, 1990.

Signature Affixed
Nick G. Lambros
Judge, Fulton State Court

Affidavit:

PERSONALLY APPEARED before the undersigned officer authorized to administer oaths, **WILLIAM A. DINGES** who, after being sworn, deposes and says:

1.

I am over 18 years of age and I am competent to give this affidavit. I am attorney of record for the Plaintiff in this action.

2.

This lawsuit appeared on a trial calendar published on October 15, 1990, in the fulton County Daily Report. The calendar was for the weeks of October 5 and October 12, 1990. Cases on the calendar were palced on one-hour call. This lawsuit was case #5.

3.

As with previous calendars, a thirty-six hour notice was requested because the Plaintiff resides in New York. As before, I anticipated notice in some amount beyond one hour topermit me to procure the attendance of my client.

4.

On November 6, 1990, at 12:20 P.M., Glenda Burton, Judge Lambros' Calendar Clerk, called my office and asked to speak to me. I was not present hving left my office to vote. She then asked to speak with my paralegal. He was at lunch. Ms. Burton requested that she be connected with the firm's voice mail. She left a message that the case was called to trial and that I was to report at 1:30 P.M. to strike a jury. My client need not report until 9:00 A.M. on November 7. The foregoing was verified

by me in a telephone conversation with Ms. Burton on Novemebr 6. Unfortunately, the voice mail message went astray.

5.

Ms. Burton called a second time at approximately 1:30 P.M. However, before the call could be taken, Ms. Burton hung up. I discovered in a subsequent telephone conversation with Ms. Burton that she had been called into the courtroom by the Judge at that time.

6.

A subsequent call to Ms. Burton by my paralegal at approximately 1:35 P.M. revealed that a Defendant's Judgment had already been entered. This was also verified by Ms. Burton in the subsequent telephone conversation.

7.

The judgment in the case was filed

by the clerk of Court, as shown by his stamp, at 1:54 P.M. on November 6, 1990.

8.

Contrary to the implication contained in the judgment, I was not present for the call of the case for trial. Further, Plaintiff did not fail "...to put up evidence to prove the elements of its (sic) case... ." Had I been present I would not have agreed to the striking of Plaintiff's demand for a jury and would have insisted on a trial by jury.

This affidavit is made upon my personal knowledge for use in support of Plaintiff's Motion to Vacate Judgment and I depose that if sworn as a witness in this action I could and would competently testify to the foregoing facts.

Signature of Record
WILLIAM A. DINGES

State of Georgia
County of Dekalb
Sworn to and subscribed before me
this 12th day of November, 1990.

Signature of Record for Daniel L. Hale
NOTARY PUBLIC

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT, INC.

COOPER, Judge. Issued 9/3/91

This appeal arises from a judgment entered in favor of defendant when plaintiff failed to appear at the call of her case for trial.

The trial court's order, entered on November 6, 1990, recites the following: "The case having come on for trial with notice to all parties, the court having struck the demand for jury trial upon motion by defendants, the court having called the case and the plaintiff having failed to put up evidence to prove the elements of its case, the court after hearing and considering evidence offered by the defendants, the court hereby enters judgment in favor of the defendants . . ." Plaintiff's attorney

admits that the case appeared on a trial calendar for the week of November 6 but contends that when the case had appeared on previous calendars, the trial judge had granted him thirty-six hours notice in which to appear because plaintiff resided in New York. Plaintiff alleges that on November 6, 1990 at 12:20 p.m., the trial court's calendar clerk called his office and left a message that the case would be called for trial at 1:30 p.m. Although the trial court's order states that plaintiff failed to put up evidence to prove the elements of her case, it is undisputed that neither plaintiff nor her attorney appeared for the trial of the case on November 6, 1990. Plaintiff argues that the non-appearance of plaintiff or her attorney for the trial amounted to a failure to prosecute the case; therefore, the trial

court only had authority to dismiss her case pursuant to OCGA s 9-11-41 (b). We agree and reverse the trial court. "For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action . . . (Such dismissal) does not operate as an adjudication upon the merits . . ." OCGA s 9-11-41 (b). In addition, Rule 14 of the Uniform Rules for the Superior Courts, which pursuant to the Uniform State Court Rules, is also applicable to the State Courts, provides: "On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action . . . upon the failure to properly respond to the call of the action for trial or other proceeding." Thus, both the Civil Practice Act and the Uniform Rules of the Superior Courts provide an appropriate

sanction which may be employed by the court when a plaintiff fails to appear at the call of his case for trial. In the case sub judice, the trial court went beyond the available sanction and entered a judgment in favor of the defendants. while we recognize the broad discretion a trial court has in regulating the business before it, Ford Motor Credit Co. v. Williams, 194 Ga. App. 405 (1) (390 SE2d 640) (1990), we find no authority for the action taken by the trial court. Consequently we conclude that the trial judge abused his discretion in entering a judgment against plaintiff when she failed to appear for trial.

Because we are reversing the trial court, we find it unnecessary to address plaintiff's remaining enumeration of error that the trial court erred in

striking her demand for jury trial.

Judgment reversed. Birdsong, P.J., and Pope, J., concur.

In the Supreme Court of Georgia

Decided: Jun 23 1992

S92G0189. KRAFT, INC. v. ABAD

CLARKE, Chief Justice.

Erma L. Abad, who lives in New York, was in an automobile accident with a vehicle driven by an employee of Kraft, Inc. She filed a personal injury action against Kraft in Fulton County. The case appeared on the trial calendar three times. Each of these calendars provided notice to plaintiff's counsel that the case could be called for trial on that day. The third time the case was on the calendar, the case was reached. The trial court's docket clerk had telephoned Abad's attorney an hour before the case was reached. Abad was in New York recovering from abdominal surgery. Her

attorney could not be reached by phone. Neither Abad nor her attorney appeared at the call of the case. The trial court heard evidence put forward by defendant Kraft and entered judgment in its favor. The Court of Appeals reversed, saying that under OCGA S9-11-41(b) (lack of prosecution) or Superior Court Rule 14 (Failure to respond to calendar call) the trial court had only the authority to dismiss the action without prejudice. We granted certiorari and now reverse.

OCGA S9-11-41(b) and Superior Court Rule 14 both contain permissive language. Under either provision the court <u>may</u> dismiss an action without prejudice if the plaintiff fails to appear at the call of the case. Neither provision, however, exhausts the options available to the trial court under its authority to

control its own docket and regulate the business of the court. Scocca v. Wilt, 243 Ga. 2 (252 SE2d 401) (1979). The rule and the statute simply allow the court to dismiss the action and restricts the dismissal to one without prejudice. It goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the court may go forward with the trial of the case as was done here. The judgment that is entered following such a trial is not a dismissal. It is a judgment like any other judgment that is subject to appeal, motion for new trial, or a motion to set aside under OCGA S9-11-60.

Because we reverse on the above grounds, we do not address Kraft's remaining arguments.

Judgment reversed. All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

S92G0189. KRAFT, v. ABAD

BENHAM, Justice, dissenting.

It is provided in OCGA S 9-11-1 that the Civil Practice Act "shall be construed to secure the just, speedy, and inexpensive determination of every matter."

The fact that the language in OCGA S 9-11-41 (b) and Uniform superior Court Rule 14 is permissive does not mean that the trial court is unlimited in its responses to the failure of counsel or a party to answer a calendar call. The trial court could not, for instance, dismiss the matter with prejudice because, as the majority notes, the trial

court's discretion in dismissing is limited to a dismissal without prejudice. It is clear from that limitation that the legislature intended to limit the punitive options available to a trial court under these circumstances. The action of the trial court in the present case amounts to no more than a dismissal with prejudice, the entry of judgment without a presentation of the merits, based solely on the absence of a party and counsel. Even under former law which permitted dismissal with prejudice in the context of involuntary dismissals, such a harsh sanction was not to be imposed on the basis of absence alone. Hancock v. Oates, 244 Ga. 175 (259 SE2d 477) (1979). It may be seen, then that the trial court's decision to go ahead with the trial in the absence of the plaintiff and plaintiff's counsel was merely an

indirect means of accomplishing what the legislature has decreed shall not be accomplished directly.

To answer the concern that the decision of the Court of Appeals leaves trial courts at the mercy of dilatory or neglectful attorneys and parties, I would note that there are sanctions in place to deal with the failure of attorneys and parties to appear at the call of cases in which they are involved. An involuntary dismissal without prejudice, with its attendant expense, delay, and inconvenience is one such sanction. The provision in USCR 14, cited by the majority, for holding an attorney in contempt for failure to appear at the call of a case is another. A more creative approach than the entry of a final judgment without the presentation

of evidence by the party bearing the burden of proof might be the award to the opposing party of expenses of litigation based on the offending party's or attorney's unnecessary expansion of the litigation. Any of those approaches would better serve the ends of justice than the punitive measure imposed by the trial court.

The opinion of the Court of appeals accurately set out the law and applied it to this case. I would, therefore, affirm the judgment of the Court of Appeals; I must, therefore, dissent. I am authorized to state that Justices Fletcher and Sears-Collins join in this dissent.

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT.

Dated Dec. 4, 1992

Cooper, Judge.

This court entered a judgement in the above-styled case at 201 Ga. App. 523 (411 SE2d 500) (1991) reversing the judgment of the trial court. The Georgia Supreme Court granted certiorari in Kraft v. Abad, 262 Ga. 336 (417 SE2d 317) (1992) and reversed our holding. Accordingly, our judgment is hereby vacated, and the judgment of the Supreme Court is made the judgment of this court with respect to appellant's first enumeration of error. In our first opinion, we declined to address appellant's second enumeration of error in which she argued that the trial court erred in striking her demand for a jury trial. We conclude that the authority to

(s)

also strike appellant's demand for a jury trial was implicit in the trial court's authority to enter judgment in favor of the appellee/defendant upon appellant/plaintiff's failure to appear at trial. Cf. Stewart v. Stewart, 260 Ga. 812 (400 SE2d 622) (1991). Appellant's reliance on Sewell v. Leifer, 144 Ga. App. 36 (240 SE2d 584) (1977) is misplaced. In that case, the trial judge entered judgment in favor of the plaintiff upon the defendant's failure to appear, but there remained the issue of damages to be tried by the jury. Furthermore, any error in striking appellant's demand was harmless since appellant failed to present any evidence and judgment for appellee was demanded. See Marler v. C & S Bank, 239 Ga. 342 (236 SE2d 590) (1977). Accordingly, we find no merit to this enumeration of

error.

Judgment affirmed. Birdsong, P.J., and Pope, J., concur.

Amendment 5 to the Constitution of the United States, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 7 to the Constitution of the United States, "In suits at common law,

where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 14, Section 1, to the Constitution of the United States, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws."

The Preamble of the Constitution of the State of Georgia of 1983, "To perpetuate the principles of free government, insure justice to all, preserve peace, promote the interest and happiness of the citizen and of the family, and transmit to posterity the enjoyment of liberty, we the people of Georgia, relying upon protection and guidance of Almighty God, do ordain and establish this Constitution."

Article 1, S 1, P 1 of the Constitution of the State of Georgia of 1983, "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, S 1, P 2 of the Constitution

of the State of Georgia of 1983, "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Article 1, S 1, P 11 (a) of the Constitution of the State of Georgia of 1983, "(a) The right to trial by jury shall remain inviolate, except that the court shall render judgment without verdict of a jury in all civil cases where no issuable defense is filed and where a jury is not demanded in writing by either party. In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts.

Official Code of Georgia Annotated, Section 9-11-38, "The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."

Official Code of Georgia Annotated, Section 9-11-39, "(a) The parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, may consent to trial by the court sitting without a jury. (b) In all actions not triable of right by a jury, or where jury trial has been expressly waived, the court may nevertheless order a trial with a jury whose verdict will have the same effect as if trial by jury had been a matter of right or had not been waived."

Official Code of Georgia Annotated, Section 9-11-41 (b), "**Involuntary dismissal**; effect thereof. For failure of the plaintiff to prosecute or to comply with this chapter or any order of Court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence. Unless the court in its order for dismissal

otherwise specifies, a dismissal under this subsection and any dismissal not provided for in the Code section, other than a dismissal for lack of jurisdiction or for improper venue or lack of an indispensable party, operates as an adjudication upon the merits."

Uniform Superior Court Rules, of the State of Georgia, Rule 8.4, "Trial Date. The parties and counsel in the first 10 actions on the published trial calendar shall appear ready for trial on the date specified unless otherwise directed by the assigned judge. Parties in all other actions on the calendar are expected to be ready for trial but may contact the calendar clerk to obtain: (A) A specific date and time for trial during the trial term specified in the calendar; or, (B) Permission to await the call by the

calendar clerk of the action for trial upon reasonable notice to cousel.

Uniform Superior Court Rules, of the State of Georgia, Rule 14, "**DISMISSAL** On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action, or where appropriate, any pleading filed on behalf of any party upon the failure to properly respond to the call of the action for trial or other proceeding. In civil actions or criminal cases the court may adjudge any attorney in contempt for failure to appear without legal excuse upon the call of any proceeding."

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERMA L. ABAD,

Petitioner

versus

KRAFT, INC.,

CHARLES H. DIAL,

Respondents

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon the clerk of the Supreme Court of the United States, forty copies, and counsel for the Respondents in the foregoing matter, a copy of the PETITION FOR WRIT OF CERTIORARI, by depositing

same in the United States Mail in a properly addressed envelope, adequate postage thereon to:

Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, d.C. 20543
(202) 479 - 3000

Gene a. Major, Esq.
Bruce A. Maxwell, Esq.
Fain, Major, & Wiley, P.C.
300 The hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688 - 6633

Michael J. Bowers, Esq.
Attorney General - State of Georgia
132 State Judicial Building
42 Capital Square, S.W.
Atlanta, Georgia 30334
(404) 656 - 4585

Dated this 2nd day of March, 1993

Jonap & Associates, P.C.

By: _____
Arthur C. Nilsen
Georgia State Bar # 538860

COUNSEL FOR PETITIONER
Erma L. Abad

1944 Clairmont Road
Decatur, Georgia 30033
(404) 320 - 6000

Supreme Court, U.S.
F I L E D
APR 23 1993
OFFICE OF THE CLERK

No. 92-1568

In The

Supreme Court of the United States

October Term, 1992

ERMA L. ABAD,

Petitioner,

v.

KRAFT, INC. and CHARLES H. DIAL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DONALD M. FAIN
BRUCE A. MAXWELL
Counsel for Respondents
FAIN, MAJOR & WILEY, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Respondents do not agree with Petitioner's questions presented for review. Instead, Respondents show, if any such review is granted, which they contend it should not, the following is the only question presented for review before this Honorable Court:

Whether the Supreme Court of the State of Georgia erred in finding the Court of Appeals of the State of Georgia's decision operated to deny Respondents' due process and equal protection of law?

LIST OF ALL PARTIES

Petitioner:

Erma L. Abad

Represented by:

Arthur C. Nilsen
Jonap & Associates, P.C.
1944 Clairmont Road
Decatur, Georgia 30033

Respondents:

Kraft, Inc.[1]

Represented by:

Donald M. Fain
Bruce A. Maxwell
Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

Charles H. Dial

Represented by:

Donald M. Fain
Bruce A. Maxwell
Fain, Major & Wiley, P.C.
300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

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[1] Subsequent to the filing of the within action, Kraft, Inc. changed its corporate name to Kraft General Foods, Inc. Petitioner failed to amend her Complaint to cure this misnomer.

TABLE OF CONTENTS

Page

I. Question Presented i

II. List of All Parties ii

III. Official Report of Case iv

IV. Table of Authorities v

V. Statement of the Case 1

VI. Summary of Argument 6

VII. Argument and Citation of Authority In Opposition to Allowance of Writ 7

VIII. Appendix A1

- Judgement of Trial Court date 11/06/90 ..... A1
- Court of Appeals decision dated 09/03/91 ..... B1
- Supreme Court of Georgia decision dated 06/23/92 ..... C1
- Supreme Court of Georgia Order dated 06/23/92 ..... D1
- Court of Appeals decision dated 12/04/92 ..... E1

OFFICIAL REPORT OF CASE

State Court of Fulton County, State of Georgia, Civil Action File No.: 134012, *Erma L. Abad, et al. v. Kraft, Inc. and Charles H. Dial* (1990) ..... Appendix Page A1

The Court of Appeals of the State of Georgia, Case No.: A91A1084, *Abad v. Kraft, Inc.*, 201 Ga. App. 523, 411 S.E.2d 500 (1991) ..... Appendix Page B1

The Supreme Court of the State of Georgia, Case No.: S92G0189, *Kraft, Inc. v. Abad*, 262 Ga. 336, 417 S.E.2d 317 (1992) ..... Appendix Page C1

The Supreme Court of the State of Georgia, Case No.: S92G0189, *Kraft, Inc., et al. v. Abad*, ORDER dated June 23, 1992 ..... Appendix Page D1

The Court of Appeals of the State of Georgia, Case No.: A91A1084, *Abad v. Kraft, Inc.*, ___ Ga. App. ___, 426 S.E.2d 270 (1992) ..... Appendix Page E1

TABLE OF AUTHORITIES

Page

O.C.G.A. § 9-11-41 5

Uniform Superior Court Rule 14 5

Georgia Court of Appeals Rule 4 8

Georgia Court of Appeals Rule 48 8

United States Supreme Court Rule 13.1 ..... 7, 9, 11

United States Supreme Court Rule 13.3 9

United States Supreme Court Rule 13.4 10

STATEMENT OF THE CASE

Respondents do not agree with the Petitioner's Statement of the Case as cast. This matter does arise out of an automobile incident which occurred on May 27, 1985. Suit was filed on July 11, 1986 with ensuing discovery. The scenario of events outlined in the Petitioner's Statement of the Case concerning the trial calendar, however, is not entirely correct.

At the trial court level, this case involved disputed liability and disputed damages. Initially, the case appeared on a July 16, 1990 two-week trial calendar. The case was not reached on that calendar. The case was then placed on a September 17, 1990 two-week trial calendar at which time the case was in position number 11 on the initially published calendar. Again, the case was not reached for trial and was continued to a two-week trial calendar beginning November 5, 1990, which provided as follows:

> The following cases are on a two-week calendar beginning on November 5, 1990. Since all cases were continued for the September calendar, there will be no need to call to report the expected length of trial. If you have a case that settles, please call Glenda Burton, Calendar Clerk, at 730-5177 by Friday, October 26, 1990.
>
> There will be a revised calendar published in the Fulton County Daily Report on Tuesday, October 30, 1990, which will delete any case which may have settled. The first case on the revised calendar will report ready for trial on Monday, November 5, 1990, at 10:00 a.m. *All remaining cases will be on a one-hour notice.* The

> cases may not necessarily be tried in order in which they appear on a calendar.

(Original emphasis).

At the time the revised trial calendar was published on Tuesday, October 30, 1990, the present case was in position number five (5) on the list of cases. (R. 26).[2]

Contrary to the record, Petitioner maintains before this Honorable Court that a 36-hour notice in connection with the published trial calendar had been granted. Instead, the record shows that the trial court did not grant Petitioner a 36-hour notice and during the week before the case was called for trial, the trial court expressly denied Appellee's request for advance notice beyond that provided for in the published calendar. Notwithstanding this knowledge, Petitioner, Erma Abad, failed to come from New York, her resident state, to Atlanta, Georgia, so that she could be available for the trial of her case.

On the morning of November 6, 1990, the Judge's calendar clerk, Glenda Burton, telephoned counsel for Petitioner and counsel for Respondents informing them that the case would be reached for trial at 1:30 p.m. that same day.[3] Ms. Burton later telephoned Petitioner's counsel's office again informing office personnel that the case

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[2] All record citations are herein represented by the symbol R. to be followed by the corresponding Georgia record page number.

[3] After being instructed to report, counsel for Respondents telephoned the office of Petitioner's counsel later that same morning to discuss the trial that was scheduled to begin at 1:30 p.m. At that time, Respondents' counsel was told counsel for Petitioner "had stepped away from his desk."

would be reached at 1:30 p.m., at which time she was told that counsel for Petitioner was away from his desk. Ms. Burton then left a message on Petitioner's lawyer's voice mail informing him that the case would be tried at 1:30 p.m. (R. 34-37).

Pursuant to the published calendar and the Judge's calendar clerk's instructions, Respondents and their counsel arrived in Court to try the case at 1:30 p.m. on November 6, 1990. (R. 34). Respondents' counsel along with the trial judge, waited some period of time for the Petitioner and her lawyer to appear in court. (R. 34). The Judge's calendar clerk, Glenda Burton, repeated her efforts to telephone the Petitioner's lawyer to inform him that the judge and opposing counsel were waiting. (R. 35-37).

At the very least, counsel for Petitioner and his office personnel were notified that the matter was being reached for trial. (R. 37). Notwithstanding telephone notice on or before 12:20 p.m. that the case was being called for trial, Petitioner's counsel did not appear at the courthouse. Petitioner, Erma Abad, also failed to appear for the call of her case. After waiting some period of time for Petitioner and her lawyer to arrive, the trial court proceeded with a trial on the merits. (R. 34). The trial court heard evidence supporting Respondents' liability defense and based upon that evidence, entered a judgment in favor of Respondents. (R. 34).

Petitioner incorrectly argued to the Court of Appeals for the State of Georgia that she was entitled to a thirty-six (36) hour notice in connection with the published trial calendar (again, contrary to the express terms of the trial

calendar). (R. 37). No such agreement to provide thirty-six (36) hour notice was granted by the trial court. Petitioner further argued to the Court of Appeals that the trial court at most had the power to dismiss the case without prejudice, a non-sanction. The Court of Appeals reversed the judgment in favor of the Respondents essentially finding that the trial court had no discretion to control its docket and could only dismiss the case without prejudice. (See Court of Appeals decision dated September 3, 1991, Appendix pp. B1 thru B3).

In response to the decision of the Court of Appeals, Respondents filed a Motion for Rehearing on September 16, 1991. The Motion for Rehearing was denied. Respondents then filed a Notice of Intention to Apply for a Writ of Certiorari with the Georgia Supreme Court.

A Petition for Certiorari was filed before the Georgia Supreme Court on November 1, 1991. Initially, the Georgia Supreme Court denied the Respondents' Petition for Certiorari. Respondents then filed a timely Motion for Reconsideration on December 9, 1991. In response to the Motion for Reconsideration, the Georgia Supreme Court vacated its previous denial and granted the Writ of Certiorari in this case on December 20, 1991. The Georgia Supreme Court's Order stated that the Court was particularly concerned with whether the opinion of the Court of Appeals operated to deny Kraft, Inc. and Charles H. Dial due process and equal protection of law. It should be noted that the Court of Appeals did not address Petitioners' jury demand issue. Likewise, the Georgia Supreme Court did not address the jury demand issue.

It is entirely true that Respondent's Petition For Certiorari filed with the Georgia Supreme Court argued the Court of Appeals' decision presented an issue of great concern, gravity and importance to the public. The Supreme Court of Georgia resolved this important issue by reversing the Court of Appeals and re-instating the judgment in favor of the Respondents. *On June 23, 1992,* the Georgia Supreme Court issued its opinion reversing the Court of Appeals, emphasizing that neither O.C.G.A. § 9-11-41(b) (concerning lack of prosecution) or Superior Court Rule 14 (concerning failure to respond to a calendar call), exhausts the options available to the trial court under its authority to control its own docket and regulate the business of the court. (Appendix p. C2) The Georgia Supreme Court further emphasized that "it goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the Court may go forward with the trial of the case as was done here." (See Supreme Court of Georgia opinion decided June 23, 1992, Appendix pp. C1 thru C3.) On June 23, 1992, the Supreme Court of Georgia remanded the case to the Court of Appeals noting that its decision was reversed and "that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in this case". (Appendix p. D1.)

On July 2, 1992, the Petitioner filed a Motion for Reconsideration with the Supreme Court of Georgia. The Petitioner's Motion for Reconsideration was denied on July 16, 1992.

Later, on December 4, 1992, the Court of Appeals, per the Georgia Supreme Court's prior instructions, published a decision vacating its previously issued opinion.

(*See* Court of Appeals' decision dated *December 4, 1992*, emphasis supplied, Appendix pp. E1 thru E2.) The Court of Appeals went on to note that the authority to also strike the demand for a jury-trial of Appellant (Erma Abad) was implicit in the trial court's authority to enter judgment in favor of the Appellee/Defendant upon Appellant's/Plaintiff's failure to appear at trial. (*Id.*) The December 4, 1992 decision of the Court of Appeals contained notice which instructed that Motions for Reconsideration must be received in the clerk's office within ten (10) days of the date of the decision. (Appendix p. E1.)

No such Motion for Reconsideration was filed by the Petitioner. The filing of a Motion for Reconsideration is a requirement under Georgia law before one may seek further review by the Supreme Court of Georgia, the state court of last resort. Further, contrary to the Petitioner's argument, no such December 4, 1992 decision of the Supreme Court of Georgia exists in this matter. The decision erroneously referred to by the Petitioner in her brief is that of the Court of Appeals of Georgia which is not a state court of last resort.

SUMMARY OF ARGUMENT

The Petitioner has failed to exhaust her state court remedies. The Petitioner erroneously refers to a December 4, 1992 decision by the Georgia Supreme Court denying reconsideration from a Court of Appeals decision. No such December 4, 1992 decision of the Georgia Supreme Court exists. Furthermore, the Petitioner did not file a motion for reconsideration with the Georgia Court of

Appeals within ten (10) days after the issuance of its December 4, 1992 opinion, a pre-requisite to petitioning for certiorari with the George Supreme Court. Further, the Petitioner has failed to file a second Petition for Certiorari with the Georgia Supreme Court following the December 4, 1992 decision of the Court of Appeals. Therefore, the Petitioner has not been denied Discretionary review by the state court of last resort as required by United States Supreme Court Rule 13.1.

The Petitioner has failed to file a timely Petition for a Writ of Certiorari with this Honorable Court. The decision from which the Petitioner is seeking further appellate review is that of the Georgia Supreme Court which was issued on June 23, 1992. Plainly, the Petitioner has also failed to seek a Writ of Certiorari from that decision within the ninety (90) days provided for by Supreme Court Rule 13.1.

ARGUMENT AND CITATION OF AUTHORITY IN OPPOSITION TO ALLOWANCE OF WRIT

I. THE PETITIONER HAS FAILED TO EXHAUST HER STATE COURT REMEDIES.

The Petitioner continually refers to a December 4, 1992 decision by the Supreme Court of Georgia. No such decision exists. This would account for the failure of Petitioner to attach a copy of any such decision to her Petition. The only December 4, 1992 decision was issued by the Court of Appeals of Georgia which is not a state court of last resort as required by United States Supreme Court Rule 13.1. Petitioner has also failed to exhaust her

state court appellate remedies by filing a Motion for Reconsideration within ten (10) days after the December 4, 1992 decision of the Court of Appeals. The filing of such a motion for reconsideration is a pre-requisite to seeking further Appellate review by the Supreme Court of Georgia. (*See* Georgia Court of Appeals Rules 4 and 48.)

Petitioner incorrectly states to this Honorable Court the following:

> On December 4, 1992, the Georgia Supreme Court denied the Petitioner's Motion for Reconsideration through and to the Court of Appeals of Georgia and affirmed its decision of June 23, 1992 and thereafter transmitted to the trial court the remittitur. *See* Appendix p. S).

The Petitioner erroneously refers to Page S of her Appendix in support of this statement. Page S of the Petitioner's Appendix is simply the beginning of the December 4, 1992 decision of the Court of Appeals of Georgia and from which, the Plaintiff failed to seek further review.

The Petitioner is incorrectly seeking review of a judgment of a lower state court which has not been denied discretionary review by the state court of last resort. Petitioner has failed to exhaust her Appellate remedies by petitioning for Certiorari a second time with the Supreme Court of Georgia following the issuance of the December 4, 1992 decision of the Court of Appeals. The Petitioner failed to file a Motion for Reconsideration within ten (10) days after issuance of the Court of Appeals' December 4, 1992 opinion, a pre-requisite to seeking Certiorari before the Supreme Court of Georgia. (*See* Rule 48 of the Court

of Appeals of the State of Georgia.) Therefore, the Petitioner is seeking a Writ of Certiorari from a lower state court which has not been denied discretionary review by the state court of last resort as required by United States Supreme Court Rule 13.1. Again, no such order by the state court of last resort exists.

II. THE WITHIN PETITION FOR A WRIT OF CERTIORARI HAS NOT BEEN TIMELY FILED.

The Petitioner has failed to timely file a Petition for a Writ of Certiorari before this Honorable Court. Supreme Court Rule 13.1 provides as follows:

> A Petition for a Writ of Certiorari to review a judgment in any case, civil or criminal, *entered by a state court of last resort*, a United States Court of Appeals, or the United States Court of Military Appeals, shall be deemed in time when it is filed with the clerk of this Court *within ninety (90) days after the entry of the Judgment*. A Petition for a Writ of Certiorari seeking review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort shall be deemed in time when it is filed with the clerk *within ninety (90) days after the entry of the order denying discretionary review.*

Sup. Ct. R. 13.1 (Emphasis supplied). Further, this Honorable Court's rules provide "the Clerk will refuse to receive any Petition for a Writ of Certiorari which is jurisdictionally out of time". Sup. Ct. R. 13.3. Also, this Court's rules provide "the time for filing a Petition for a Writ of Certiorari runs from the date the judgment or decree sought to be reviewed is rendered, not from the

date of issuance of the mandate (or its equivalent under local practice)." Sup. Ct. R. 13.4.

The Petitioner has failed to timely file her Petition for a Writ of Certiorari. The judgment from which the Petitioner seeks further review was issued by the Supreme Court of Georgia on June 23, 1992. In excess of eight (8) months has passed since the Petitioner filed for a Writ of Certiorari before this Honorable Court and the date on which the Supreme Court of Georgia's decision was rendered. The filing of the within Petition has plainly occurred in excess of the ninety (90) days required by United States Supreme Court Rule 13.1.

CONCLUSION

The Petitioner has failed to exhaust her state court remedies. The Petitioner repeatedly refers to a Supreme Court of Georgia decision dated December 4, 1992. No such decision exists. Instead, a Court of Appeals decision dated December 4, 1992 exists. The December 4, 1992 decision of the Court of Appeals is subject to discretionary review by the Supreme Court of Georgia by way of a Petition for Certiorari. The Petitioner failed to timely file a motion for reconsideration within the ten (10) days following the Court of Appeals' December 4, 1992 decision which is a pre-requisite to her filing a petition for certiorari with the Supreme Court of Georgia, the state court of last resort.

No order denying discretionary review by the Georgia Supreme Court concerning the December 4, 1992 decision of the Court of Appeals of Georgia exists. Therefore,

the Petitioner incorrectly argues she is seeking review of a judgment of a lower state court which has been denied discretionary review. The Petitioner failed to seek such discretionary review and does not have an order denying the same as required by United States Supreme Court Rule 13.1.

The Petitioner has failed to timely file her Petition for a Writ of Certiorari. The Supreme Court of Georgia decision from which the Petitioner is seeking further review is dated June 23, 1992. Plainly, this decision was rendered in excess of eight (8) months prior to her filing of the within Petition for a Writ of Certiorari.

WHEREFORE, Respondents pray this Honorable Court deny the within Petition for a Writ of Certiorari.

This 23rd day of April, 1993.

Respectfully submitted,

FAIN, MAJOR & WILEY, P.C.

BY: Donald M. Fain
DONALD M. FAIN

BY: Bruce A. Maxwell
BRUCE A. MAXWELL

Attorneys for Respondents

300 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
(404) 688-6633

Judgment of Trial Dated 11/06/90

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

ERMA L. ABAD and ERMA L. ABAD as Next Friend of VINCENT ABAD and ELIZABETH ABAD, Plaintiffs, v. KRAFT, INC. and CHARLES H. DIAL, Defendants.	)	CIVIL ACTION FILE NO.: **134012**

JUDGMENT

The case having come on for trial with notice to all parties, the Court having struck the demand for jury trial upon motion by Defendants, the Court having called the case and the Plaintiff having failed to put up evidence to prove the elements of its case, the Court after hearing and considering evidence offered by the Defendants, the Court hereby enters Judgment in favor of the Defendants with costs cast upon Plaintiffs.

This 6th day of November, 1990.

(s/NICK G. LAMBROS)
JUDGE, FULTON STATE COURT

Court of Appeals Decision Dated 09/03/91

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT, INC. Co-069.

COOPER, Judge.

This appeal arises from a judgment entered in favor of defendant when plaintiff failed to appear at the call of her case for trial.

The trial court's order, entered on November 6, 1990, recites the following: "The case having come on for trial with notice to all parties, the court having struck the demand for jury trial upon motion by defendants, the court having called the case and the plaintiff having failed to put up evidence to prove the elements of its case, the court after hearing and considering evidence offered by the defendants, the court hereby enters judgment in favor of the defendants . . . " Plaintiff's attorney admits that the case appeared on a trial calendar for the week of November 6 but contends that when the case had appeared on previous calendars, the trial judge had granted him thirty-six hours notice in which to appear because plaintiff resided in New York. Plaintiff alleges that on November 6, 1990 at 12:20 p.m., the trial court's calendar clerk called his office and left a message that the case would be called for trial at 1:30 p.m. Although the trial court's order states that plaintiff failed to put up evidence to prove the elements of her case, it is undisputed that neither plaintiff nor her attorney appeared for the trial of the case on November 6, 1990. Plaintiff argues that the non-appearance of plaintiff or her attorney for the trial amounted to a failure to prosecute the case; therefore, the trial court only had authority to dismiss her

case pursuant to O.C.G.A. § 9-11-41(b). We agree and reverse the trial court. "For failure of the plaintiff to prosecute . . . , a defendant may move for dismissal of an action. . . . [Such dismissal] does not operate as an adjudication upon the merits. . . . " O.C.G.A. § 9-11-41(b). In addition, Rule 14 of the Uniform Rules for the Superior Courts, which pursuant to the Uniform State Court Rules, is also applicable to the State Courts, provides: "On its own motion or upon motion of the opposite party, the court may dismiss without prejudice any civil action . . . upon the failure to properly respond to the call of the action for trial or other proceeding." Thus, both the Civil Practice Act and the Uniform Rules for Superior Courts provide an appropriate sanction which may be employed by the court when a plaintiff fails to appear at the call of his case for trial. In the case sub judice, the trial court went beyond the available sanction and entered a judgment in favor of the defendants. While we recognize the broad discretion a trial court has in regulating the business before it, *Ford Motor Credit Co. v. Williams*, 194 Ga. App. 405(1) (390 S.E.2d 640 (1990),we find no authority for the action taken by the trial court. Consequently, we conclude that the trial judge abused his discretion in entering a judgment against plaintiff when she failed to appear for trial.

Because we are reversing the trial court, we find it unnecessary to address plaintiff's remaining enumeration of error that the trial court erred in striking her demand for jury trial.

Judgment reversed. Birdsong, P.J., and Pope, J., concur.

Supreme Court of Georgia Decision Dated 06/23/92

In the Supreme Court of Georgia

Decided: June 23, 1992

S92G0189. *KRAFT, INC. v. ABAD*

CLARKE, Chief Justice.

Erma L. Abad, who lives in New York, was in an automobile accident with a vehicle driven by an employee of Kraft, Inc. She filed a personal injury action against Kraft in Fulton County. The case appeared on the trial calendar three times. Each of these calendars provided notice to plaintiff's counsel that the case could be called for trial on that day. The third time the case was on the calendar, the case was reached. The trial court's docket clerk had telephoned Abad's attorney an hour before the case was reached. Abad was in New York recovering from abdominal surgery. Her attorney could not be reached by phone. Neither Abad nor her attorney appeared at the call of the case. The trial court heard evidence put forward by defendant Kraft and entered judgment in its favor. The Court of Appeals reversed, saying that under O.C.G.A. § 9-11-41(b) (lack of prosecution) or Superior Court Rule 14 (failure to respond to calendar call) the trial court had only the authority to dismiss the action without prejudice. We granted certiorari and now reverse.

O.C.G.A. § 9-11-41(b) and Superior Court Rule 14 both contain permissive language. Under either provision the court *may* dismiss an action without prejudice if the plaintiff fails to appear at the call of the case. Neither provision, however, exhausts the options available to the

trial court under its authority to control its own docket and regulate the business of the court. *Scocca v. Wilt*, 243 Ga. 2 (252 S.E.2d 401) (1979). The rule and the statute simply allow the court to dismiss the action and restricts the dismissal to one without prejudice. It goes without saying that the trial court may elect to continue the case and set it for trial on another date. Alternatively, the court may go forward with the trial of the case as was done here. The judgment that is entered following such a trial is not a dismissal. It is a judgment like any other judgment that is subject to appeal, motion for new trial, or a motion to set aside under O.C.G.A. § 9-11-60.

Because we reverse on the above grounds, we do not address Kraft's remaining arguments.

Judgment reversed. All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

Supreme Court of Georgia Order Dated 06/23/92

Case No. S92G0189

SUPREME COURT OF GEORGIA

ATLANTA JUNE 23, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

KRAFT, INC., ET AL. V. ERMA L. ABAD

This case came before this court by writ of certiorari from the Court of Appeals; and, after argument had, it is considered and adjudged that the judgment of the Court of Appeals be **Reversed,**

and that such further action be taken by the Court of Appeals as may be necessary to give effect to the opinion filed in this case.

All the Justices concur, except Benham, Fletcher and Sears-Collins, JJ., who dissent.

(ON GRANT: Weltner, Benham and Fletcher, JJ., dissent.)

134012
Court of Appeals Case No. A91A1084

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta DECEMBER 07, 1992
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court affixed the day and year last above written.

Clerk.

Court of Appeals Decision Dated 12/04/92

In the Court of Appeals of Georgia

A91A1084. ABAD v. KRAFT. Co-069.

COOPER, Judge.

This court entered a judgment in the above-styled case at 201 Ga. App. 523 (411 S.E.2d 500) (1991) reversing the judgment of the trial court. The Georgia Supreme Court granted certiorari in *Kraft v. Abad*, 262 Ga. 336 (417 S.E.2d 317) (1992) and reversed our holding. Accordingly, our judgment is hereby vacated, and the judgment of the Supreme Court is made the judgment of this court with respect to appellant's first enumeration of error. In our first opinion, we declined to address appellant's second enumeration of error in which she argued that the trial court erred in striking her demand for a jury trial. We conclude that the authority to also strike appellant's demand for a jury trial was implicit in the trial court's authority to enter judgment in favor of the appellee/defendant upon appellant/plaintiff's failure to appear at trial. Cf. *Stewart v. Stewart*, 260 Ga. 812 (400 S.E.2d 622) (1991). Appellant's reliance on *Sewell v. Leifer*, 144 Ga. App. 36 (240 S.E.2d 584) (1977) is misplaced. In that case, the trial judge entered judgment in favor of the *plaintiff* upon the defendant's failure to appear, but there remained the issue of damages to be tried by the jury. Furthermore, any error in striking appellant's demand was harmless since appellant failed to present any evidence and judgment for appellee was demanded. See *Marler v. C&S Bank*, 239 Ga. 342 (236 S.E.2d 590) (1977).

Accordingly, we find no merit to this enumeration of error.)

Judgment affirmed. Birdsong, P.J., and Pope, J., concur.

92-1568
No.

Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

UNIFIED SCHOOL DISTRICT NO. 501,
SHAWNEE COUNTY, KANSAS
Petitioner

v.

CHARLES SMITH & KIMBERLY SMITH,
MINOR CHILDREN, BY THEIR
MOTHER AND NEXT FRIEND,
LINDA BROWN SMITH, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX VOLUME I

K. GARY SEBELIUS*
ANNE L. BAKER
WRIGHT, HENSON, SOMERS,
SEBELIUS, CLARK & BAKER
100 S.E. 9TH STREET, 2ND FLOOR
P.O. BOX 3555
TOPEKA, KANSAS 66601-3555
(913) 232-2200

*Counsel of Record

April, 1993

QUESTIONS PRESENTED

Where a school system was previously *de jure* segregated in the elementary grades with respect to student assignment, in 1955 ended segregation at elementary schools and assigned all pupils to neighborhood attendance centers, between 1955 and 1965 was required to significantly expand its geographic boundaries, and in 1981 completed full implementation of two HEW-approved desegregation plans based upon a neighborhood school policy -------

1. Does the defendant school district as a precondition to a declaration of unitary status have an affirmative duty to correct all racial imbalances without regard to cause and to achieve maximum practicable integration in the entire system as currently composed?

2. Do the plaintiffs seeking district-wide court ordered remedies sustain their burden of proof by establishing a *de jure* violation in 1954 in the elementary schools and slight current racial imbalances; and, if so, may the defendant school district rebut the inference of continued constitutional violation by showing an absence of causation between the past *de jure* system and the current imbalances?

3. May the Court of Appeals set aside the trial court's findings of fact made in 1987 that the system is unitary and, based upon legal standards different from those applied by the trial court, make its own evaluation of the evidence and rule that plaintiffs are entitled to a district-wide desegregation remedy without providing the district court an opportunity to apply the new legal principles to either the record evidence or the conditions of the schools at the time of remand?

4. Is Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, violated simply because of an equal protection violation in 1954 coupled with current racial imbalances or must the evidence be evaluated under the specific burden of proof standards of Title VI?

LIST OF PARTIES

1. The original plaintiffs in this case were:

Linda Carol Brown, an infant, by Oliver Brown, her father and next friend; James Melden Emmanuel, an infant, by Sadie Emmanuel, his mother and next friend, Nancy Jane Todd, an infant, by Lucinda Todd, her mother and next friend; Ronald Douglas Richardson, an infant, by Iona Richardson, his mother and next friend; Katherine Louise Carper, an infant, by Lena Carper, his mother and next friend; Charles Hodison, an infant, by Shirley Hodison, his mother and next friend; Theron Lewis, Martha Lewis, Arthur Lewis, and Francis Lewis, infants, by Alma Lewis, their mother and next friend; Saundria Dorstella Brown, an infant, by Darlene Brown, her mother and next friend; Dwayne Dean Flemming and Silus Hardrick Flemming, infants, by Shirla Flemming, their mother and next friend; Donald Andrew Henderson and Vickie Ann Henderson, infants, by Mrs. Andrew Henderson, their mother and next friend, Ruth Ann Scales, infant, by Vivian Scales, her mother and next friend; Claude Arthur Emmerson and George Robert Emmerson, infants, by Marguerite Emmerson, their mother and next friend; and Victoria Jean Lawton and Carol Kay Lawton, by Mrs. Richard Lawton, their mother and next friend.

2. The plaintiffs who were permitted to intervene in this case in 1979 are:

> Charles and Kimberly Smith, minor children, by their mother and next friend, Linda Brown Smith; Danielle Threatt, a minor child, by her mother and next friend, Juda Gaines; Shawn, Tanya and Tara Woods, minor children, by their mother and next friend, Joyce Woods; Cordellia Mitchell and Connie Maxwell, minor children, by their mother and next friend, Barbara Mitchell; Arlene Jackson, a minor child, by her mother and next friend, Charlene Burkes; Carlesia and Cheryl Robinson, minor children, by their mother and next friend, Patricia Robinson; Rufus D. and Michelle Kelley, minor children, by their father and next friend, Rufus Kelley; John, Jackie, Johnny and Viola Davis, minor children, by their mother and next friend, Ruby Davis.

3. The original defendants in this case were:

> The Board of Education of Topeka, Shawnee County, Kansas; Kenneth McFarland, Superintendent of Schools of Topeka, Kansas; Frank Wilson, Principal of Sumner Elementary School; and the State of Kansas.

4. The defendants after the grant of intervention in 1979 are:

> Unified School District No. 501, Shawnee County, Kansas, the successor to the Board of Education of Topeka, Shawnee County, Kansas; John Carlin, Governor of the State of Kansas; Dorothy Groesbeck, Kay Groneman, Ruth Ann Oelsner, Floyd J. Grimes, Dale Carey, Harold H. Crist, and Keener, Marland Harwood, Joe Bergner, Theodore Von Fange, Jim Hiebert, Denise Apt, and Evelyn Whitcomb, members of the State of Kansas, Board of Education, all in their official capacities.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE . . . 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 11

A. The Ruling Below Expands the Affirmative Duty of Formerly *De Jure* Segregated School Systems Beyond that Required by this Court 12

B. This Court Should Accept Certiorari to Exercise its Supervisory Power 22

CONCLUSION 25

Appendix Volume I
[bound following the
Petition for Writ of Certiorari]

Memorandum Decision of United States District Court for the District of Kansas, filed April 9, 1987 . . . . . 1a

Appendix Volume II

Majority Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1b

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1c

Order on Petition for Writ of Certiorari, United States Supreme Court, filed April 20, 1992 . . . . . 1d

Majority Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . 1e

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . 1f

Judgment of the Tenth Circuit Court of Appeals, entered October 27, 1992 . . . . . 1g

TABLE OF AUTHORITIES

Cases

Brown v. Board of Educ., 98 F. Supp. 797 (D.Kan. 1951) 3

Brown v. Board of Education (Brown I), 347 U.S. 483 (1954) 1, 3, 15, 22

Brown v. Board of Education (Brown II), 349 U.S. 294 (1955) 1, 3, 5

Brown v. Board of Educ., 139 F. Supp. 468 (D. Kan. 1955) 3

Brown v. Board of Educ., 84 F.R.D. 383 (D. Kan. 1979) 8

Columbus v. Bd. of Ed. v. Penick, 443 U.S. 449 (1979) 25

Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) 25

Dowell v. Bd. of Educ. of Okla. City Public Schools, 890 F.2d 1483 (10th Cir. 1989) *rev'd*, 498 U.S. 237 (1991) 14, 20

Board of Educ. v. Dowell (Dowell), 498 U.S. 237, 111 S.Ct. 630 (1991) 2, 10, 14-15, 20-24

Freeman v. Pitts (Freeman), 503 U.S. __, 112 S.Ct. 1430 (1992) 2, 10, 13-17, 19-25

Milliken v. Bradley, 418 U.S. 717 (1974) 17

Milliken v. Bradley, 433 U.S. 267 (1977) 13, 17

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976) 17

Pitts by Pitts v. Freeman, 887 F.2d 1438 (11th Cir. 1989) *rev'd*, 503 U.S. __ (1992) 14, 18

Pullman-Standard v. Swint, 456 U.S. 23 (1982) 23

Statutes, Constitutional Provisions, and Rules

42 U.S.C. § 2000d (Title VI) 2, 8, 10, 12

Fourteenth Amendment to the United States Constitution 2

Miscellaneous

The Supreme Court - Leading Cases, 106 Harv. L. Rev. 163, 257 (1992) 25

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner, the Board of Education of Topeka, Shawnee County, Kansas, by its successor, Unified School District No. 501, Shawnee County, Kansas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 978 F.2d 585 (10th Cir. 1992), and reprinted in Appendix Volume II, App. 1e-16e (majority opinion) and App. 1f-14f (dissenting opinion). This opinion incorporates by reference the previous opinion reported at 892 F.2d 851 (10th Cir. 1989) and reprinted in Appendix Volume II, App. 1b-102b (majority opinion) and App. 1c-193c (dissenting opinion).

The decision of the United States District Court for the District of Kansas is reported at 671 F.Supp. 1290 (D.Kan. 1987) and reprinted in Appendix Volume I, App. 1a-61a.

Prior opinions by this Court are *Brown v. Board of Education* (*Brown I*), 347 U.S. 483 (1954) and *Brown v. Board of Education* (*Brown II*), 349 U.S. 294 (1955). In 1992 this Court granted the defendant school district's Petition for Certiorari, vacated the 1989 opinion of the 10th Circuit (App. 1b-102b and 1c-193c), and remanded for reconsideration in light of

Board of Educ. v. Dowell, 498 U.S. 237, 111 S.Ct. 630 (1991) ("Dowell") and *Freeman v. Pitts*, 503 U.S. __, 112 S.Ct. 1430 (1992) ("Freeman"). *Brown v. Board of Education*, __ U.S. __, 112 S.Ct. 1657 (1992), reprinted in Appendix Volume II, App. 1d.

JURISDICTION

The judgment of the Court of Appeals was entered October 27, 1992, and is reprinted in Appendix Volume II, App. 1g-3g. A timely petition for rehearing was denied on January 28, 1993, and is reprinted in Appendix Volume II, App. 1h-2h. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

This case concerns the equal protection clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, reprinted in Appendix Volume II, App. 1i.

STATEMENT OF THE CASE

Initial Litigation and Responses in the 1950's

In 1951, the parents of Topeka black elementary students filed[1] a class action challenging the

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[1] The original trial was heard by a three-judge district court, convened under 28 U.S.C. §§2281 and 2284. *Brown I*, 247 U.S. at 486 n.1

constitutionality of the Kansas statute which permitted maintenance of separate schools for black and white elementary school children. Although segregated by student assignment, the elementary schools were found to be equal "with respect to buildings, transportation, curricula, and educational qualifications of teachers." *Brown I*, 347 U.S. at 486 n.1. In addition, the non-elementary grades were "non-segregated". *Id.*[2]

Despite the trial court having initially upheld the constitutionality of the Kansas statute, segregation was ended at 14 of the 18 formerly all-white elementary schools prior to this Court's 1954 opinion in *Brown I*.[3] App. 9a, 18c-19c. On remand following *Brown II*, the district court approved the district's neighborhood elementary school desegregation plan as "a good faith beginning" to bring about "complete desegregation," but retained jurisdiction. *Brown v. Board of Educ.*, 139 F.Supp. 468, 470 (D.Kan. 1955). There was neither an appeal of the approval of the desegregation plan nor further proceedings until intervention was granted in 1979. App. 5b-6b.

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[2] In 1951, there was only one high school which was attended by all students without regard to race. In 1941, the junior high schools had been desegregated. App. 2a, 8a-9a.

[3] In 1951 there were 22 elementary schools--18 for white and 4 for black children. Brown v. Board of Educ., 98 F.Supp. 797 (D.Kan. 1951); App. 17c-18c. At its request this Court received maps in April, 1955, showing the Topeka school district's boundaries for the 1955-56 school year and the percentage of anticipated black-white enrollment for each school.

Overview of Schools in 1985

None of the *de jure* black schools remain today. Between 1967 and 1985 (the date of the most current statistics during the 1986 trial), enrollment decreased from 25,000+ to 15,000 (App. 29c n.8), while minority enrollment increased from 16% to 26%. App. 103c. Nevertheless, the district experienced very substantial desegregation. App. 20a-21a, 102-105c. Racial inventories at the neighborhood attendance centers during the 1960's are set forth in App. 30c n.9-34c n.13. Statistics for the 1985-86 school year are in App. 55c n.18-57c. Although there is not complete racial balance, there are no one-race minority schools in Topeka, nor schools on the threshold of such status. Thirty-one of the thirty-four schools are majority white by student assignment. Of the 3 schools that are majority-minority, the greatest concentration is 61.9% minority.[4] What has occurred since 1955 to make this possible?

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[4] These facts are summarized by Judge Baldock in his appellate dissent. App. 6c, 16c-17c. As the trial court found, students "are not separated by race. The smallest percentage of white students in any school in the 1985-86 school year was thirty-eight percent." App. 20a. Nevertheless, the court of appeals found a current condition of segregation in Topeka, by resort to a mathematical measure of "racial identifiability" based upon a school's deviation from the district-wide average of minority enrollment. Any school which was less than 11% minority or more than 41% minority was deemed "racially identifiable" because it deviated more than 15% from the district-wide average of 26% minority in 1985. App. 47b-49b.

End of *de jure* Segregation in 1955 and Demographic Changes During the 1970's

In 1955, segregation was terminated at all remaining elementary buildings.[5] Governmental acts during the 1960's over which the district had no control substantially altered the demographics and the racial mix of some neighborhood schools. As the City of Topeka expanded its boundaries through annexation, more than doubling its geographic size between 1955 and 1965, the district was required to educate school age children living within the annexed areas. App. 60b, 78b, 28c-29c. The primary population growth occurred in the western area of Topeka, resulting in the construction of a new high school, 3 junior highs, and 6 elementary schools in the 1950's and early 1960's. App. 26a-27a. Whereas these schools initially served neighborhoods which were primarily white, at the same time, new elementary schools replaced existing facilities having mixed racial compositions. *Id.*

In the early 1960's, the construction of Interstate 70 highway had a segregative effect. Likewise, a number of federally subsidized housing projects were constructed causing racial imbalances. For example, across the street from Belvoir, 22.7% minority when annexed in 1960 and the school with the highest *black* enrollment in 1985 (54.7%), housing projects were

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[5] As a result black children were present in eighteen of the twenty-three elementary schools. App. 9a. By the 1955-56 school year, all elementary school children attended their neighborhood school without regard to race. Within one year of the *Brown II* mandate, 56% of black elementary students were dispersed to the formerly all-white schools and 67% of white elementary students attended schools with black students. *Id.*

constructed in 1963 and 1965, increasing the minority enrollment to 59.7% in 1966. App. 81b-82b, 136c-139c. The newly constructed interstate highway formed its southern boundary. After Hudson opened in 1963 with 8% minority enrollment, housing projects also were constructed in its attendance area in 1965, 1967, and 1970. By 1985, Hudson was 46.6% minority. App. 139c-142c. Projects were constructed in the Lafayette attendance area (13% minority in 1955) in 1961, 1962, and 1970, by which time the minority enrollment was 57%.[6] App. 83b-84b, 145c-147c.

HEW Desegregation Plans Approval and Implementation in the 1970's

In 1974, in response to formal administrative proceedings initiated by HEW to obtain compliance with Title VI, the district developed a short-range plan[7]. In 1975, the Board adopted a resolution for closing schools to promote integration and also created a citizen's advisory committee, an affirmative action program to encourage minority employment, and a learning center "operated in a manner to encourage integration". App. 48c-49c. In 1976, the Board adopted a long range (five-year) plan and altered the Board election system, improving opportunities for minority membership. App. 54a-55a, 49c-55c.

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[6] Lafayette was *de jure* white. App. 145c. Lafayette's greatest minority percentage (68.9%) was in 1975. By 1986 it was reduced to 56.8% minority, through implementation of the HEW plans. App. 145c-147c.

[7] The short-range plan closed two junior high schools in 1975 and two elementary schools, including Monroe --- the last of the formerly all-black elementary schools. App. 10b, 14b, 48c.

In 1976, HEW dismissed the proceedings on the basis of the district's commitment to implementation of the 1976 plan. App. 6b, 51c. This five-year integrative plan, which continued adherence to a neighborhood school policy, included elimination of all remaining optional attendance areas; closure of five of the nine junior high schools; transfer of the ninth grade to the senior high schools in the 1980-81 school year; establishing six middle schools by the conversion of four junior high schools and the construction of two additional middle schools; and closure of six elementary schools.[8] App. 14b, 50c-51c. The district's desegregation indices for elementary schools improved "significantly" between 1975 and 1981. App. 64b n.71; *see also* 100c-105c (dissent's expanded discussion of the desegregation indices).

Conversion to middle schools in 1980 resulted in the reassignment of 190 teachers, which was implemented "to achieve a distribution of minority staff members which will comply with requirements of the law." App. 52c-53c. At the time of trial, every school had minority personnel. In the elementary schools personnel were 10.78% minority, with individual schools ranging from 4.3% minority to 18.18% minority. The minority average for middle school personnel was 13.22%, with individual schools ranging from 6.67% to 16.67%. There were from five to eleven minority faculty members in each high school. App. 128c-131c.

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[8] By 1978 all the *de jure* black schools had been closed. In 1955 McKinley was closed. App. 9a. Buchanan was closed in 1959 and Washington in 1962. *Id.* Monroe was closed in 1978. App. 25a.

Stability During the 1980's

By the 1981-82 school year, the HEW-approved plans had been fully implemented, and student racial composition was virtually stable from 1981 to time of trial. App. 21a-22a, 55c. The target minority percentages approved by HEW in 1976 were either met or improved upon.[9] App. 69b n.76.

Intervention in 1979 and Trial in 1986

In 1979, at the beginning of the fourth year of the five-year plan, a group of black elementary students and parents intervened, alleging the district was not unitary.[10] Although not a part of the original case, the class action was subsequently expanded to include black middle and high school students; and, in March, 1986, the complaint was amended to include Title VI claims.

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[9] While HEW did not approve the projected enrollments at two elementary schools (Lafayette and Belvoir) their projections were substantially improved upon by the district. In the five years since completion of the plan, "minority enrollments increased in the primarily white schools, bringing them towards or over 10% minority, while the percentage of minority students at [higher minority enrollment] schools has remained steady or dropped slightly. The most significant change is that the schools with the highest white percentages have gained some minority students." App. 69b n.76; *see also* 54c n.17.

[10] *See Brown v. Board of Educ.*, 84 F.R.D. 383 (D.Kan. 1979). Two weeks after the motion to intervene was filed, HEW completed its investigation of a patron complaint regarding the long-range plan and the district's open enrollment transfer policy. HEW found that the district's assignment policies did not violate Title VI. Likewise, HEW concluded that the open enrollment policy had not significantly affected the racial composition of schools. Thereafter, the Board adopted a majority-to-minority policy to assure transfers had an integrative effect. App. 51c-52c.

After a month-long trial, the trial court found the school district's "neighborhood school approach has achieved a high level of integration". App. 60a. In determining "[t]here is no illegal, intentional, systematic *or residual separation* of the races" (App. 55a) (emphasis added), the court carefully examined 18 factors.[11] It concluded that school construction has not promoted residential segregation or segregated schools (App. 28a); space additions were not intentionally used to promote segregation, and the schools are not racially imbalanced today because of space additions constructed in the past (App. 24a-25a); current attendance patterns do not reflect residential choice caused by the prior *de jure* school segregation (App. 19a); school boundary locations are determined by consistently applied race-neutral neighborhood school principles without gerrymandering (App. 30a, 32a, 56a); any segregative effect of optional attendance zones in existence until 1976 does not remain today (App. 23a); school closings over the past 30 years indicate a policy of desegregation (App. 25a); and the school transfer policy is used to improve racial balance (App. 22a). The court found that the school district had "proven by a preponderance of the evidence that [it] is a unitary school system." App. 14a. It found no constitutional (App. 57a) or Title VI violation. App. 57a-58a.

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[11] The court evaluated: statistical measures of student population; student transfer policy; optional attendance zones; space additions; school closings; school openings; schoolsite location; school boundary location; history of the schools; facilities; extracurricular activities; curriculum; transportation; faculty and staff; community attitudes; equality of education; opportunities for desegregation; and other factors. App. 15a-55a.

Appellate Review from 1987 to 1993

Plaintiffs appealed. Plaintiffs no longer claimed that the district lacks unitary status with respect to facilities, extracurricular activities, curriculum, transportation, and equality of education.[12] App. 46b n.53. On appeal, plaintiffs only claimed that student and faculty and staff assignments[13] evidence current segregation. A divided panel reversed. App. 1b-193c. The school district's Petition for Certiorari was granted. App. 1d. The opinion was vacated, and the case was remanded for further consideration in light of *Dowell* and *Freeman*. *Id*. The Tenth Circuit again reverses and reinstates its prior opinion in full, with additions. App. 1e-14f. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied, although five of the ten judges voted to grant rehearing *en banc*. App. 1h-2h.

The majority panel holds inadequate the district court's definition of a unitary school system as "'one in which the characteristics of the 1954 dual system did not exist, or, if they exist, are not the result of past or present intentional segregative conduct of the' school district." App. 17b. Although finding these to be necessary ingredients, the majority also imposes the

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[12] Based upon the evidence at trial, the court concluded the racial composition of the district's schools had an insignificant impact on student academic achievement from 1980 to 1986. As stated by the court, "inferior achievement, as a vestige of segregation, has been eliminated." App. 50a; *see also* 47a-50a.

[13] No fault was alleged or found with the district's hiring practices. App. 72b.

requirement that the district establish that it has used "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Id.* Under the majority decision, "[w]hat more can be done and should be done, if anything, is the final component in the determination of unitary status." App. 35b.

Although the district court held that the defendants "have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system" (App. 14a), the majority holds that the "conclusion as to unitariness was fatally infected by the inadequacy of the burden of proof standard to which it held the school district." App. 43b. It rejects the district court's finding that the causal link between the 1954 *de jure* system and the current racial imbalances has been broken. App. 11e. Based upon adoption of the plaintiffs' standard[14] of racial identifiability and its own review of the record, it concludes that current racial imbalances are "causally connected to the prior *de jure* system of segregation". App. 94b. It discounts the HEW plans (App. 59b) and rejects as mistaken the view that before a declaration of unitary status a formerly *de jure* system has no duty to correct imbalances caused by demographic changes beyond its control. App. 65b, 7e n.6, 10e. The

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[14] The majority adopts the standard of racial identifiability of ± 15% deviation from the district wide average as "perfectly reasonable" in a formerly *de jure* system (App. 48b n.55) and holds that statistics alone evidence a current condition of segregation. App. 18b-19b, 47b-49b. The dissent points out that "statistical measures of racial balance, [are] valid sociological objectives, but not a constitutional command with respect to student assignment." App. 7c.

majority remands for remedy. App. 16e. It finds a constitutional violation and holds a Title VI violation follows without application of a distinct burden of proof. App. 96b.

REASONS FOR ALLOWANCE OF THE WRIT

The Court of Appeals' resolution of this historic case turns upon a fundamental question of federal constitutional law - What is the extent of the affirmative duty of a formerly *de jure* segregated school system to achieve racial balance? It resolves that question by holding that the affirmative duty requires correction of racial imbalances to the maximum extent practicable. This expanded view of the affirmative duty infects the court's examination of the definition of a unitary system, the sufficiency of the evidence to sustain the burden of proof shifted to the school district, the materiality of demographic changes, and the adequacy of a neighborhood school policy. The Tenth Circuit's view conflicts with prior decisions of this Court, which clearly enunciate the principle that a school district has a duty to correct only those imbalances causally related to the unconstitutional segregation. Correction of the Tenth Circuit's error by this Court is imperative.

The Court of Appeals' reversal and remand for remedy disregards the proper allocation of functions between trial and appellate courts. The evidence of current segregation and causation was complex and highly controverted. The Tenth Circuit revises legal standards, engages in appellate fact-finding, and remands for development of a court ordered remedy,

even though the trial court has never had an opportunity to apply current legal standards or to consider the post-1985 conditions of the Topeka schools.

A. The Ruling Below Expands the Affirmative Duty of Formerly *De Jure* Segregated School Systems Beyond that Required by this Court

The affirmative duty of formerly segregated school systems to correct the constitutional violation is a fundamental principle of desegregation law. This Court has also consistently held that the Constitution is not violated by racial imbalances, without more. *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977). As made explicit in *Freeman*, "[t]he duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Id.*, 112 S.Ct. at 1443. It is only racial imbalances "traceable, in a proximate way, to constitutional violations" which are the proper subject of remedial orders. *Id.* at 1446.

The Tenth Circuit's reversal of the district court's finding that all vestiges of *de jure* segregation have been eliminated and its remand for remedy is inconsistent with the clearly established limitation upon a school district's affirmative duty. The majority's decision is permeated by continued adherence to a rejected, overly expansive view of the affirmative duty to achieve racial balance, particularly as to student assignment.

The majority panel adopts dual requirements for a unitary system - the elimination of vestiges *and* the achievement of the greatest possible degree of racial

balance reasonably practicable. App. 17b. This definition mirrors the continuing affirmative duty imposed by the Tenth Circuit in Oklahoma City desegregation case - the affirmative duty, despite the unitary finding, "not to take any action that would impede the process of disestablishing the dual system and its effects." *Dowell v. Bd. of Educ. of Okla. City Public Schools*, 890 F.2d 1483, 1504 (10th Cir. 1989), quoted in *Dowell*, 111 S.Ct. at 635. This Court, when reversing, rejects a standard for dissolution of an injunction tailored to fulfill this affirmative duty as one which "would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future." *Dowell*, 111 S.Ct. at 638.

In 1991, *Freeman*[15] made explicit the rejection of the Tenth Circuit's rationale that a formerly *de jure* system has a continuing affirmative duty to correct racial disparities, even when not caused by the former *de jure* system.

> The Court of Appeals was mistaken in ruling that our opinion in *Swann* requires "awkward," "inconvenient" and "even bizarre" measures to achieve racial balance in student assignments in the late phases of carrying out

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[15] The reversed Eleventh Circuit opinion, *Pitts by Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989), like the reversed Dowell opinion of the Tenth Circuit, was premised upon a continuing affirmative duty to achieve racial balance. "We also reject the district court's refusal to require the DCSS to eradicate segregation caused by demographic changes." *Id.* at 1449.

> a decree, when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces.

Freeman, 112 S.Ct. at 1447. Despite direction to consider *Dowell* and *Freeman* upon remand, the majority panel in 1992 reinstates its 1989 opinion which, like the Tenth and Eleventh Circuit opinions reversed by this Court, was predicated upon the premise that "the law requires the maximum desegregation reasonably feasible, and [when] evidence suggests that more can be done, unitariness must await the implementation of those further steps." App. 93b. The dissent notes the similarity between the majority's view and the view of Justice Blackman in *Freeman*, a view that does not represent the majority of the Court. App. 9f-n.6.

The starting point for the Court's flawed analysis is a definition of current segregation which places undue emphasis upon the ± 15% deviation from the district average of minority students with respect to each attendance center, while rejecting composite indices measuring integration. Compare App. 47b-49b with App. 102c-104c. As the majority concedes, "The case law is decidedly unclear as to the precise meaning" of the term "current condition of segregation." App. 18b. Yet, it is this finding which triggers the shift of the burden of proof to the defendant district.[16]

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[16] The burden is shifted as to all grades, even though there has *never* been a finding of *de jure* segregation except in elementary school student assignments. At the time of *Brown I*, there was only one high

It has been suggested that the "allocation of the burden of proof foreordains the result in almost all of the 'vestige of past discrimination' cases." *Freeman*, 112 S.Ct. at 1452 (Scalia, J., concurring). School authorities are required to establish the negative - to show that imbalances are *not* attributable to the past *de jure* discrimination. Plaintiffs often prevail merely because of the allocation, the continuing validity of which Justice Scalia has questioned. *Id.*

In the Tenth Circuit, this allocation of the burden of proof is extraordinarily onerous, not only because of the adoption of the ± 15% deviation standard, but also because of the circuit's adherence to the enhanced view of the affirmative duty. That view controls the majority's discussion of the showing necessary to rebut the presumption of continued violation. The court states, "The district may carry its burden by showing that is has acted affirmatively to desegregate. Absent such proof, the court must presume that current segregation is the result of prior intentional state action." App. 30b. The court concludes that the integrative techniques used by the district are insufficient. App. 69b-72b. Failure to sustain its burden to rebut the presumption is identified as the "key" to the court's reversal. App. 58b.[17]

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school, and junior highs had been desegregated since 1941. App. 8a-9a.

[17] The majority's 1992 opinion reiterates its view that the district court improperly resolved the burden of proof issue, particularly by requiring plaintiffs to show discriminatory intent. App. 5e-6e. The dissent continues to disagree (App. 3f) but urges that because of ambiguity as to the standard applied, the case should be remanded to district court for complete reconsideration. *Id.*

The majority's exclusive reliance upon affirmative action as the sole means to evidence a break in the causal link conflicts with this Court's recognition that demographic forces independent of the schools may be the cause of racial imbalances. Under *Freeman*, as well as prior decisions, a constitutional violation is present only if imbalances are causally linked to the *de jure* past. *Freeman*, 112 S.Ct. at 1447; *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 434-35 (1976); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974); *Milliken v. Bradley*, 433 U.S. at 280. Where the demographic changes which result in racially imbalanced neighborhood schools are unrelated to the prior violation, the school district has no duty to achieve system-wide racial balance in the student population. *Freeman*, 112 S.Ct. at 1448.

In Topeka, the district court held that residential patterns, which are reflected in neighborhood school attendance statistics, are not vestiges. "The court is persuaded that *de jure* segregation either has no significant effect upon residential patterns in Topeka or that its impact on residential patterns had attenuated to insignificance." App. 56a. "Demographic forces, uncontrolled by defendants, form the racial composition of the schools." App. 57a.

The majority's reversal of the causation issue is not because the factual findings regarding demographics are clearly erroneous. Rather, it rejects as "clearly wrong" the view of defendants' experts that "changing demographics which resulted in unfavorable racial balances at various schools excuses the school board

from achieving more acceptable racial balances." App. 65b.[18] The majority in its 1992 opinion unsuccessfully attempts to reconcile its view with *Freeman*. App. 10e. Although the majority gives lip service to the rule of causation, it removes any utility from the rule by adhering to its 1989 view that the presumption of continuing causation can be rebutted only by evidence of affirmative action which corrected all imbalances without regard to their cause.[19] *See* App. 30b. By rejecting the district court's approach as to the effect of demographic changes, the majority proceeds on the premise that demographic forces causing population changes bear a real and substantial

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[18] This rejection is nearly identical to that of the Eleventh Circuit in *Pitts by Pitts v. Freeman*, 887 F.2d at 1448, which was reversed by this Court. The Eleventh Circuit states,

> We hold that a school system that has not achieved unitary status must take affirmative steps to gain and maintain a desegregated school population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status.

Id.

[19] The majority further rejects the district court's finding that demographic forces caused the current racial imbalances by finding a "considerable tension" between that holding and the "district court's observation that demographics have had a desegregative effect on student assignment in Topeka schools." App. 8e n.6. These two findings by the district court are not in conflict. They refer to independent population shifts, the increasing racial integration in the western part of Topeka (*E.g.*, App. 38a-39a) and the segregative effect of public housing projects in other parts of the city. *E.g.*, App. 33a.

relation to the *de jure* violation. *Freeman* explicitly rejects this premise. *Freeman*, 112 S.Ct. at 1448.[20]

The majority also utilizes its expanded view of the affirmative duty to reject as constitutionally insufficient the integrative actions of the Topeka schools undertaken within its system of neighborhood schools. It finds the "district court's finding of unitariness flawed by the undue deference . . . to the school district's neighborhood school policy . . . ." App. 44b. Topeka is characterized as a system that at "best" did not resist demographic forces, and full implementation of two integration plans is totally ignored. *Compare* App. 7e *with* App. 10f-11f. The dissent, agreeing with the trial court, identifies the Topeka schools as a system where the duty to integrate is consistent with the neighborhood school concept. App. 190e.

The result, more vividly than the Tenth Circuit's discussion of legal principles, exemplifies the conflict with current Supreme Court jurisprudence. The Tenth Circuit directs a remedy even though the racial

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[20] The majority also attempts to factually distinguish *Freeman*. It contrasts Topeka with DeKalb County schools by finding that in DeKalb County, but not in Topeka, there was a "moment" when racial identifiability had been eliminated. App. 7e n.6. Of course, this "moment" is illusory. At best, in DeKalb County, the "moment" was based upon solely theoretical student assignments which would have resulted from the court approved desegregation plan if there had been no changes in demographics between the adoption and implementation of the plan. In fact, there was no time during which the DeKalb County schools were not racially identifiable. *Freeman*, 112 S.Ct. at 1439. Given the central role of causation in constitutional litigation, this Court certainly could not have meant to rule that demographic changes can be considered only if they occur after a "moment" when a desegregation plan has been adopted but not implemented.

imbalances, which the district court found not to be causally linked to the *de jure* past, are substantially less than those resulting from neighborhood schools in Oklahoma City and DeKalb County.[21] In Topeka in 1985, when the students were 26% minority and 18.6% black, there were no schools which were 90% black. App. 20a. Only one elementary school in Topeka had a slight majority black population (App. 11a), no middle school was more than 43% black (Rec.Ex.Vol. IV at 170-74; Ex.Vol. II at 159), and no high school was more than 26% black. Rec.Ex.Vol. IV at 176. Statistical indices evidence relatively high levels of integration. App. 21a-22a. In contrast, in the 47% black DeKalb County schools, 50% of the black students attended schools that were over 90% black. *Freeman*, 112 S.Ct. at 1438. Five of 22 high schools and 18 of 74 elementary schools were more than 94% black. *Id.* In Oklahoma City, where elementary students were 36% black[22], the return to neighborhood schools for grades K through 4 resulted in 11 of 64 elementary schools becoming 96% or more black and

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[21] In Oklahoma City, the Finger plan, which required busing, had been in place since 1972. The Board adopted the student reassignment plan, which relied upon neighborhood assignments for students in grades K-4 in the beginning of the 1985-86 school year. *Dowell*, 111 S.Ct. at 641 (Marshall, J., dissenting).

In *Freeman*, the court-approved 1969 HEW plan established a neighborhood school policy for Dekalb County. In the first year of implementation, the 1969-70 school year, when there were 5.6% black students in the district, one elementary school was 76% black and another 51% black. *Freeman*, 112 S.Ct. at 1438-39.

[22] *Dowell v. Bd. of Educ. of Okl. City Public Schools*, 890 F.2d 1483, 1512 (10th Cir. 1989) (Baldock, J., dissenting).

approximately 44% of all Afro-American children in such grades being assigned to one race schools. *Dowell*, 111 S.Ct. at 641 (Marshall, J., dissenting).

The record of affirmative integrative action in Topeka shows error in the majority's conclusion that in Topeka, in contrast to Oklahoma City and DeKalb County, "the school board did very little to desegregate its student assignment practices." App. 7e. It is true that Topeka did not use busing, as did Oklahoma City. Its desegregation action is similar to, but significantly more effective than, that in DeKalb County. Both Topeka and DeKalb County implemented HEW-approved plans based upon neighborhood schools. In DeKalb County, demographic changes prevented the plan from producing racial balancing of student assignment (*Freeman*, 112 S.Ct. at 1439), whereas in Topeka the resulting integration of attendance centers was greater than the plan's projections. App. 69b n.76. In Topeka, unlike DeKalb County, plaintiffs did not prevail on the issue of quality of education. Compare App. 46b n.53 with *Freeman*, 112 S.Ct. at 1442. The majority "is unable to see the desegregative effect of many changes because it has strayed far beyond the purpose of desegregation law." App. 58c. The different outcomes cannot be rationalized.

Nearly forty years have elapsed since this Court's initial decision in this case. Yet, as illustrated by comparison of the trial judge's opinion and the court of appeals' two majority opinions and two dissenting opinions, the decisions of this Court provide fertile grounds for conflicting views of the extent of the

affirmative duty to integrate.[23] Because of the public nature of the interest involved and nationwide ongoing litigation concerning unitary status, this Court should clarify the extent of the affirmative duty and consider whether the extraordinary allocation of the burden of proof in unitary status litigation remains warranted generations after *Brown I*.

B. This Court Should Accept Certiorari to Exercise its Supervisory Power

The trial occurred over six years ago, in October, 1986. The Tenth Circuit reverses, but rather than

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[23] Although the issue of the affirmative duty was discussed in both *Freeman* and *Dowell*, resolution of those cases was narrow because of the injunction imposing the Finger Plan in *Dowell* and the finding of a lawful student assignment in *Freeman*, arising from the plaintiffs' concession that the DeKalb County desegregation plan "effectively desegregated DCSS for a period of time." *Freeman*, 112 S.Ct. at 1439. In addition to the matters discussed above, the majority's view of good faith also exhibits an expanded view of the affirmative duty. The majority identifies as a "potential problem" with *Dowell* "the possibility of immediate resegregation following a declaration of unitariness." App. 13e-14e. It therefore directs the district court when evaluating good faith to consider "specific policies, decisions, and courses of action that extend into the future," including consideration of "continued commitment to integration" after dissolution of the decree. App. 12e, 14e. Contrary to this approach, the good faith requirement of *Dowell* evidences that a school district has "accepted the principle of racial equality and will not suffer intentional discrimination in the future." *Freeman*, 112 S.Ct. at 1449-50. This does not suggest that the good faith requirement can be used indirectly as a vehicle to extend district court control and require affirmative integrative action after unitariness. *See Dowell*, 111 S.Ct. at 637-38.

remanding for reconsideration of unitary status, directs development of a remedy.

The remand usurps the trial court's function of determining *whether the Topeka schools* are unitary under current legal standards. At the 1986 trial, neither the parties nor the court had the benefit of this Court's recent rulings. Decisions regarding the presentation of evidence and expert opinions were influenced by legal standards prior to *Dowell* and *Freeman*. The majority remands for remedy based upon its application of current case law to the controverted factual evidence of the history and status of the schools in 1985-86. Even if the majority's legal analysis were not in conflict with decisions of this Court, the remand would nevertheless violate the rule that when, as here, it is held that a trial court committed errors of law, the case must be remanded for revised findings under the proper legal standard. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).[24]

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[24] The rare exception to remand for reconsideration upon reversal for errors of law arises when only one reasonable conclusion can be drawn from the record evidence. *Pullman-Standard v. Swint*, 456 U.S. at 292. This is not such a case. Although the statistics are uncontroverted, the conclusions to be drawn from these facts are highly controverted. This is made evident by the contrasting the conflicting findings made by the district and appellate courts. The majority rejects the trial court's finding that "the statistics indicate that students in U.S.D. #501 are not separated by race" (App. 20a), and concludes, based upon its own review, that "the racially overbalanced schools . . . add up to a current condition of segregation." App. 49b. Likewise, with respect to faculty and staff, the majority reverses the finding that the "district's assignment policies [do not] serve to identify schools as intended for white or black students." App. 43a. Although the district court rejected the allegation of a correlation between minority staff

In both *Dowell* and *Freeman*, where new legal standards were adopted, this Court specifically directed that it was the district courts, not the courts of appeals, which were to make new findings of fact under the revised legal standards.[25] Any other disposition would have conflicted with the flexibility of the unitariness standard.

The remand interferes with the discretion vested in trial judges in desegregation litigation. The term "unitary" has no fixed meaning and does not "confine the *discretion* and authority of the *District Court* in a way that departs from traditional equitable principles." *Freeman*, 112 S.Ct. at 1444 (emphasis added).
The role of trial judges in school desegregation litigation is unique because the courts are being asked

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assignment and high minority student population (App. 41a-42a), the majority found such correlation "clear" (App. 54b), based upon its evaluation of "the data on its face." App. 50b. The majority, in addition to finding errors of law, also engaged in appellate fact finding as to whether current imbalances were vestiges of the *de jure* system. The district court held "[d]emographic forces, uncontrolled by defendants, form the racial composition of the schools." App. 57a. The appellate court held the school district did not establish the absence of a causal link between the *de jure* past and the present. App. 58b.

[25] In *Dowell*, after reversing and propounding the standards applicable to the dissolution of an injunction imposing a desegregation plan, this Court remanded the matter to district court. *Dowell*, 111 S.Ct. at 638. Upon reversing the holding of the Eleventh Circuit in *Freeman* rejecting an incremental release of judicial control over desegregation plans, this Court stated that further proceedings were appropriate where the district court, "not having our analysis before it, did not have the opportunity to make specific findings and conclusions on [a particular] aspect of the case." *Freeman*, 112 S.Ct. at 1449. The dissent urges a similar disposition of this case. App. 3f-4f.

to "restructure the administration" of the local system of public education. *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 410 (1977). "[T]he elimination of the more conspicuous forms of governmentally ordained racial segregation over the last 25 years counsels undiminished deference to the factual adjudications of the federal trial judges in [school desegregation cases], uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit." *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 470 (1979) (Stewart, J., concurring). Commentators identify *Freeman* as exhibiting increased deference to district court determinations in desegregation cases. *The Supreme Court - Leading Cases*, 106 Harv. L. Rev. 163, 257 (1992). The Tenth Circuit has improperly withdrawn the discretion and authority of the district court to determine the need for a court ordered remedy.

The remand violates the rule that a remedy is justifiable only when a constitutional violation exists. *Freeman*, 112 S.Ct. at 1445. No court has considered the current status of the Topeka schools to determine whether a constitutional violation currently exists. Under the order of remand, current conditions are deemed relevant only when considering the parameters of a remedy. App. 15e.

CONCLUSION

For the foregoing reasons, the Petitioner prays that the Court grant review. The Court should again vacate the Tenth Circuit opinion and remand with directions to return the matter to district court.

Respectfully submitted,

K. Gary Sebelius*
Anne Lamborn Baker
Wright, Henson,
Somers, Sebelius, Clark & Baker
100 E. 9th Street
PO Box 3555
Topeka KS 66601-3555
913/232-2200

Counsel for Petitioner

*Counsel of Record

April, 1993

APPENDIX

Volume I
[bound following the
Petition for Writ of Certiorari]

Memorandum Decision of United States District Court for the District of Kansas, filed April 9, 1987 . . . . . 1a

Volume II

Majority Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1b

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1c

Order on Petition for Writ of Certiorari, United States Supreme Court, filed April 20, 1992 . . . . . 1d

Majority Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . . 1e

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . . 1f

Judgment of the Tenth Circuit Court of Appeals, entered October 27, 1992 . . . . . 1g

Order Denying Motion for Rehearing with Suggestion for Rehearing En Banc, Tenth Circuit Court of Appeals, filed January 28, 1993 . . . . . 1h

Constitutional and Statutory Provisions Involved--The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d 1i

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

OLIVER BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
and	)	
	)	
CHARLES and KIMBERLY SMITH, minor children, by their mother and next friend, LINDA BROWN SMITH, et al.,	)	
	)	
Intervening Plaintiffs,	)	Case No. T-316
	)	
vs.	)	
	)	
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

[Filed April 9, 1987]

I. Introduction.

In 1954, the Supreme Court's landmark decision in this case signaled the close of a disgraceful period of *de jure* segregation in schools of Topeka, Kansas and other parts of the nation. This case has returned to this court for a trial to determine whether the vestiges of *de jure* segregation have been eliminated. The trial was conducted from October 6, 1986 to October 31, 1986. Post-trial briefs were filed in December, 1986. Reply briefs followed on January 28, 1987. The court is now prepared to issue the following findings of fact and conclusions of law.

II. History of the Case.

This case started in 1951 as a class action challenging a state statute which gave the defendant Board of Education of Topeka, Shawnee County, the power to organize separate schools for black and white elementary students, grades one through six. At that time, there were eighteen white elementary schools and four black elementary schools. White students were assigned to the schools on the basis of neighborhood districts. No transportation was afforded white students. Transportation to the black schools was provided by the Board of Education. Students could

attend the black school of their choice. In practical effect, one of the original plaintiffs, Oliver Brown, was suing for the right to have his daughter, Linda, attend a neighborhood white school instead of taking a bus to a black school.

The State of Kansas intervened in the trial to defend the constitutionality of the state legislation authorizing elementary school segregation at the option of school boards in cities of the first class. The trial court, on August 3, 1951, refused to "substitute our own views for the declared law by the Supreme Court" and upheld the constitutionality of state-authorized segregation in Topeka's public elementary schools. 98 F.Supp. at 798.

The Supreme Court accepted the trial court's finding that the physical facilities of white and black schools in Topeka and other "tangible" factors were equal, but concluded that "in the field of public education the doctrine of 'separate but equal' has no place." 347 U.S. at 495. This finding was based on the conclusion that separating children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

At the close of the Court's opinion, reargument was ordered on the question of relief. One year later, in May 1955, the Court noted that "substantial progress" in the elimination of racial discrimination in public

schools had been made in Kansas. 349 U.S. at 299. The case was then remanded to the U.S. District Court of Kansas to fashion and effectuate such an equitable decree as was "necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." 349 U.S. at 301. The Court noted that: "Traditionally, equity had been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. at 300.

Following the remand of this case from the Supreme Court, the district court considered a remedial decree submitted by the Board of Education. The "central principle" of the decree, as described by the district court, was that children, regardless of color, would attend the school in the district of their residence. 139 F.Supp. at 469. Addressing the concern that some all-black schools remained under the Board's plan, the court stated:

> Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.
>
> If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.

> It is the conclusion of the court that while complete desegregation has not been accomplished in the Topeka School System, a good faith effort toward that end has been made and that, therefore, the plan adopted by the Board of Education of the City of Topeka be approved as a good faith beginning to bring about complete desegregation.

139 F.Supp. at 470.

No appeal was taken from the district court's order. This case remained inactive until 1979 when a new group of parents with school children in Topeka's public schools were permitted to intervene. The new plaintiffs charge that the mandate to desegregate Topeka's schools has never been completed. After a long process of discovery and the consideration of pretrial motions, the trial of this case was accomplished.

III. The Parties.

The new named plaintiffs in this case are a group of parents with black children attending various schools in Unified School District #501. In place of the Board of Education of Topeka, Shawnee County, Kansas, Unified School District (U.S.D.) #501 has been named a defendant. In 1965, by a state statute unifying school districts across Kansas, U.S.D. #501 was designated as the successor to Topeka Public Schools No. 23, the

district served by the original defendant Board of Education. U.S.D. #501 includes public schools in the same area concerned in the original complaint plus substantial additional territory annexed by the City of Topeka since this case was filed. Prior to the creation of U.S.D. #501, the boundaries of Topeka Public Schools No. 23 grew with the city limits of Topeka. The boundaries of U.S.D. #501 and the city limits are no longer coterminous. There are three other school districts in areas outlying Topeka, Kansas. These districts are not parties to this action.

The State Board of Education (SBE) is a party defendant in this case. It was created by state constitutional amendment in 1966. The SBE became an operating body in 1969. It supervises elementary and secondary education in Kansas.

IV. Legal Principles.

Since 1955, the defendant school district and its predecessor have been charged "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board*, 391 U.S. 430, 437-38 (1968). "Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick*, 443 U.S. 449, 459 (1979).

Unfortunately, even in 1987, it is not clear what unitariness entails. Note, *Allocating the Burden of Proof After A Finding of Unitariness in School Desegregation Litigation*, 100 HARV.L.REV. 653, 662 (1987). "[T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977). *De facto* segregation (segregation caused by private choice) and segregation caused by authorities other than those sued in this case, are not part of the constitutional violation found in 1954. See *Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973); *Swann v. Charlotte-Meckienburg Board of Education*, 402 U.S. 1, 23 (1971). Therefore, a unitary school system must be one that has reversed the segregation caused by the school board's dual system in 1954. *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) ("Dayton II").

The mixing of students of different races in the schools is probably the most important factor in determining unitariness. (After all, separate but *equal* schools violate the Constitution.) But, complete racial balance is not required by the Constitution. *Swann*, *supra*, 402 U.S. at 24; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 and 417 (1977) ("Dayton I"). Even the existence of a "small number of one-race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law." *Swann*, *supra*, 402 U.S. at 26.

Many other factors should be considered as well. *Green*, *supra*, 391 U.S. at 435 (faculty, staff, transportation, extracurricular activities and facilities); *Keyes*, *supra*, 413 U.S. at 196, 213-14 (school site location, school size, school renovations and additions, student attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff, community and school administration attitudes).

Evidence of segregative motive or the absence of such intent is relevant but not controlling in determining unitariness. "The measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Dayton II*, *supra*, 443 U.S. at 538.

In sum, a unitary school system is one in which the characteristics of the 1954 dual system either do not exist or, if they exist are not the result of past or present intentional segregative conduct of defendants or their predecessors.

V. The Progress of Desegregation in Unified School District #501.

Desegregation started in Topeka's public schools prior to the landmark Supreme Court decision in this case. In 1951, there was only one public high school.

It served white and black students. Segregation in Topeka's junior high schools had been declared unconstitutional by the Kansas Supreme Court in 1941. *Graham v. Board of Education*, 153 Kan. 840, 114 P.2d 313 (1941). In September 1953, black elementary students who lived in the districts of two all-white elementary schools (Randolph and Southwest) were permitted to attend those schools. In January 1954, twelve other formerly all-white elementary schools permitted black student enrollment.

One of the all-black elementary schools, McKinley, was closed at the end of the 1954-55 school year, when this case was remanded by the Supreme Court. By the 1955-56 school year, black elementary students attended eighteen of the twenty-three elementary schools. The following school year, fifty-six percent of black elementary students attended formerly all-white schools; sixty-seven percent of white students attended schools with black students.[1]

In 1959, Buchanan Elementary School, a *de jure* black school which had remained all black or virtually all black, was closed. Washington Elementary School, the penultimate *de jure* black school in operation, was closed in 1962.

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[1] Unless stated otherwise, the numbers stated in this opinion do not include students attending special programs such as Head Start, Capitol City School, or special education programs.

By the 1968-69 school year, further progress at desegregation was evident. The last *de jure* black school (Monroe) had a twenty-five percent white student population. It was one of four schools, out of thirty-four elementary schools, with a majority black student population: Belvoir (56.76%); Lafayette (52.68%); Monroe (74.78%); Parkdale (90.84%). Roughly fifty percent of black elementary students attended schools with majority black student populations. The percentage attending schools with a black student population of seventy-five percent or greater was 27.5%. Approximately fifty percent of all white students attended schools which were ninety percent or more white.

Of the eleven junior high schools, one had a majority minority student population--East Topeka Junior High (60.43%). Roughly forty percent of all black junior high school student attended this school. Approximately sixty percent of all white junior high school students attended schools with white populations exceeding ninety percent.

In the 1968-69 school year, there were three high schools in U.S.D. #501. None of the high schools had a majority minority population. Topeka West High School was virtually all white (98.36%). Roughly a third of all white high school students attended this school.

During the 1968-69 school year, the total minority student population was approximately seventeen percent; the total black student population was near twelve percent.

The student attendance figures for the 1985-86 school year bear little resemblance to the figures for 1954. None of the former *de jure* black schools were open in 1985. Of the twenty-six elementary schools, only one had a majority black student population.[2] Three had majority minority populations: Belvoir (61.86%); Lafayette (56.81%); and Highland Park North (57.93%). Roughly twenty-nine percent of all black elementary students attended these schools. Five elementary schools had student populations over ninety percent white. These schools accounted for approximately twenty-four percent of the white elementary student population. No school had a ninety-five percent white student population.

In 1980, the school district changed from a junior high (grades seven through nine) to a middle school format (grades seven and eight). In the 1985-86 school year, no middle school had a majority minority student population. Two middle schools had white student populations exceeding ninety percent--French (93.77%) and Landon (90.71%). These two schools served approximately thirty-one percent of the white middle school student population. Landon has since been closed and its student population has been assigned to French.

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[2] Highland Park North Elementary School was one student short of a 50% black student body.

None of the three high schools in the district had a majority minority population in the 1985-86 school year. One high school, Topeka West High School, had a white student population exceeding ninety percent--92.06%. It served roughly forty-one percent of all white high school students in the district.

The student population for the 1985-86 school year was 26.1% minority and 18.6% black.

In sum, when this case was filed, 100% of black elementary students attended 100% black schools. Last school year, only eight percent of black elementary students attended a majority black school. Even in this school (Belvoir), there was a substantial white student population (38.14%).[3]

VI. Plaintiffs' Contentions.

Plaintiffs acknowledge the substantial progress made toward desegregation in U.S.D. #501. Plaintiffs contend, however, that over the years the district has passed up opportunities to improve racial balance throughout the district; that the vestiges of the *de jure* system of segregation remain in the form of "racially identifiable" schools; and that the existence of these schools illustrates that the mandate of the Supreme Court remains unfulfilled. Plaintiffs stress statistical

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[3] There was testimony that the minority student population of Belvoir increased to 66% in the current school year.

measures of racial identity. Under these measures, if the racial apportionment of students in one school varies from the district average by too great a percentage, then the school is racially identifiable.

Plaintiffs assert that the racial identity of schools, as determined by student racial ratios, is corroborated by faculty and staff assignments, community attitudes and students' test scores. Plaintiffs further contend that the racial identity of schools has been maintained by a variety of means (e.g., school site location, optional attendance zones, school additions and boundary location).

VII. Defendants' Contentions.

Defendants contend that U.S.D. #501 is now a unitary school system. Defendants believe plaintiffs place too much emphasis on the racial balance of students as a measure of a constitutional violation, and that demographic forces or other forces beyond the school district's control are responsible for the racial imbalance present in the schools. Defendants believe that factors other than student assignment count in the determination of a constitutional violation, and that these factors (e.g., allocation of resources, uniformity of curricula and instruction) indicate the district operates a unitary school system.

VIII. Burden of Proof.

Plaintiffs have the burden of proving that illegal segregation exists in U.S.D. #501. Whether the burden of proof should shift to the defendants to prove that illegal segregation does not exist, because of the history of intentional segregation within the district or because of the racial imbalance in the schools' student bodies today, is a difficult question. The passage of time, demographic dynamics and changes in administrative personnel detract from the justification for the *Keyes* presumption in this case.[4] Nor does this case fit the *Swann* presumption easily.[5] Regardless of the operation of these presumptions, the court believes defendants have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system.

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[4] In *Keyes*, *supra*, 413 U.S. at 208, the Court held that proof of "intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious."

[5] In *Swann*, *supra*, 402 U.S. at 26, the Court held that school authorities had the burden of proving that student assignments were "genuinely nondiscriminatory" when a desegregation plan left "some schools that are all or predominantly of one race . . ."

IX. Does Illegal Segregation Remain in U.S.D. #501?

A. Statistical Measures of Student Population.

The court shall examine many factors to decide whether illegal segregation exists in U.S.D. #501. But, the statistical measures of the racial makeup of the schools' student bodies are of prime importance. Often in school desegregation cases such statistics alone prove a pattern of discrimination. The separation of the races is the chief vestige of *de jure* segregation. If the races are no longer separated, then the system may be unitary. Since the separation of students by race can be represented statistically, such measures are important to this case.[6]

A major issue in this case is the importance of statistical racial *balance* throughout the district--i.e., maintaining a ratio of students in each school that approximates the racial mix of the entire district. The statistics indicate that white and minority students are not separated by race. Significant numbers of white and nonwhite students attend every school in the district. But, there are disparities in the racial makeup of various schools' enrollments. Plaintiffs hinge their

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[6] Racial inventories of students in the district were not kept between 1956 and 1966. The first complete inventory available to the court is for the 1967-68 school year. So, precise measures of racial mixing are not known for the first decade following the remand of the case from the Supreme Court.

case on this absence of racial balance in all schools and the failure of the defendants to take action to promote racial balance.

Plaintiffs suggest that a school is racially identifiable or imbalanced if its percentage of minority students falls beyond ± 15% of the district average of minority students. For instance, since about 26% of the district's elementary students are nonwhite, plaintiffs contend that a school with a minority enrollment of less than 11% is a "white" school, and a school with a minority population of more than 41% is a "nonwhite" school. Plaintiffs agree that tighter and wider ranges of racial balance have been used in desegregation litigation, but emphasize that under any range some racially identifiable or imbalanced schools exist in the district.[7] Since the district is responsible for student assignment, it is responsible for the racially identifiable schools.

Undoubtedly, racial imbalance *can* be the result of past segregative acts by school authorities. But, racial imbalances is unconstitutional only if it *is* caused by defendants' purposeful racial discrimination. See

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[7] One could contend that for a school to be racially identifiable, the student population should be balanced at fifty percent white and fifty percent nonwhite. This is not plaintiffs' view. They argue that, in Topeka, a fifty percent nonwhite school is identifiably nonwhite because the size of the deviation from the district average of nonwhite students means the school has significantly more nonwhite students than other schools.

Columbus Board of Education v. Penick, *supra*, 443 U.S. at 464-65; *Dayton I*, *supra*, 433 U.S. at 420; *Washington v. Davis*, 426 U.S. 229, 240 (1976). The Supreme Court has held that racial balance is not a constitutional imperative even in district with a history of purposeful segregation. *Swann*, *supra*, 402 U.S. at 24; *Dayton I*, *supra*, 433 U.S. at 417; *Milliken v. Bradley*, *supra*, 433 U.S. at 280 n. 14. Other courts have approved mandatory desegregation plans in which schools fell outside the ± 15% or ± 20% range of racial balance. See *Price v. Denison Independent School District*, 694 F.2d 334 (5th Cir. 1982); *Diaz v. San Jose Unified School Dt.*, 633 F.Supp. 808, 814 (N.D.Cal. 1985); *Singleton v. Jackson Municipal Separate School Dt.*, 541 F.Supp. 904 (S.D. Miss. 1981). (The *Price* case contains an extensive. well-reasoned criticism of a trial court's reliance upon statistical racial imbalance among schools in Denison, Texas to prove illegal segregation.) Therefore, racial balance is not an essential attribute of a unitary school system.

Nevertheless, racially conscious student assignment with the goal of racial balance has been approved as a remedy in desegregation litigation. *Swann*, *supra*, 402 U.S. at 25. This is because school segregation has an inertia which often cannot be countered by a purely neutral force. In order to achieve "the greatest possible degree of actual desegregation," (*Swann*, *supra*, 402 U.S. at 26) and, perhaps, to spread the burdens and advantages of desegregation uniformly throughout a

district, courts have used racial balance as a target for remedial action.

Still, the need for a remedial decree targeted toward racial balance depends upon whether the present imbalance derives from the *de jure* system or other intentional discrimination. It is difficult to trace the cause of racial imbalance from the record of this case. A race-neutral system of student assignment based on neighborhood schools has been employed in the district for more than three decades. Although there is some dispute as to whether racial balance has been maximized under the constraints of this system, it cannot be gainsaid that residence rather than race determines school attendance in the district and that the effects of *de jure* segregation have been substantially countered.

It could be argued that current racial residential patterns and, in turn, student attendance patterns have been affected by defendants' past discriminatory acts, but there has been little or no evidence to support this contention. Obviously, several forces, both social and economic, can influence residential choice. See *Milliken v. Bradley*, 418 U.S. 717, 756 n. 2 (Stewart, J., concurring); *Austin Independent School District v. United States*, 429 U.S. 990, 994 (1976) (Powell, J. concurring). Thirty years ago, the then Attorney General of Kansas speculated that segregated residential patterns in Topeka were influenced by the segregated school system. There is good reason to

question the strength of the alleged causality, however. For instance, black students received free transportation to black elementary schools under the *de jure* system. (Linda Brown lived near the white Sumner School and took a bus to Monroe.) This may have reduced the incentive to live near black schools. Additionally, in most instances white schools were located near black schools (Lowman Hill near Buchanan; Parkdale near Washington; Grant near McKinley; Van Buren near Monroe). This may have dissipated segregated residential patterns. Finally, two expert witnesses gave conflicting views of current research on whether school segregation causes residential segregation.

The only evidence concerning the district's recent actions regarding housing indicates that the district has opposed housing projects which might impede racial balance, and that the district has attempted to persuade realtors of the uniform quality of the public schools across the district.

Even assuming the influence of school segregation upon residential choice 30 years ago, the steady progress of school and residential integration in Topeka over three decades (particularly in formerly segregated attendance zones) indicates that the effects of school segregation on residential choice, if any, are not cognizable today.[8]

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[8] School integration may lead to white flight and residential segregation. There was slight evidence in this case that some white flight resulted from integration of the elementary schools. But the evidence did not establish that current residential patterns have been significantly

Therefore, although the issue in this case is whether additional remedial action is appropriate, it is inappropriate to use racial balance (a remedial target) as the determining factor of whether remedial action is necessary because: 1) racial balance is not a *per se* measure of an unconstitutional level of segregation; and 2) after 30 years, one cannot assume that the racial imbalance which remains is a vestige of the *de jure* system or other illegal segregation. The court concludes that statistical measures of racial mixing are an important factor in determining whether vestiges of segregation remain in U.S.D. #501. But, the issue is not decided by whether the schools are racially balanced.

The statistics indicate that students in U.S.D. #501 are not separated by race. The smallest percentage of white students in any school in the 1985-86 school year was thirty-eight percent. The smallest percentage of nonwhite students in any school was six percent. Of thirty-five schools, three had minority populations exceeded fifty percent; eight had white populations exceeding ninety percent. Only one school had a black student population which exceeded fifty percent. Only eight percent of all black elementary students (4.7% of all black students) attended this school. Only twenty-four percent of all white elementary students attended schools with white student populations exceeding ninety percent. In the 1985-86 school year, there were two middle schools with white populations exceeding ninety percent. The student populations of the two schools

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affected by white flight.

have been consolidated for the 1986-87 school year. One of plaintiffs' experts, Dr. Gordon Foster, testified that if trends continue, the consolidated school will soon become racially balanced as measured by the ± 15% standard. Forty-one percent of the district's white high school students attend a high school with a ninety-two percentage white population. But the nonwhite student population of this school is within sixteen percent of the district average of nonwhite high school students. Dr. Foster also predicated that this school would soon become racially nonidentifiable.

When one totals the student populations of the eight schools plaintiffs have labeled as racially identifiable nonwhite or vestige schools (Eisenhower Middle School and the following elementary schools: Quinton Heights, Lowman Hill, Highland Park North, Hudson, Lafayette, Avondale East and Belvoir), one finds that the schools are attended by more white students than black students (1,248 white students, 1,079 black students). Indeed, white students make up close to half (49.3%) of all the students that attend these allegedly nonwhite schools.

Statistical indices designed to measure deviation from racial balance (dissimilarity) and opportunity for interracial contact (exposure) indicate relatively high levels of integration in U.S.D.#501, although the levels may be lower than other school systems with mandatory busing plans or other more aggressive racially conscious student assignment plans. In general, the

statistical measures of racial balance have been stable over the past five years.[9]

The student attendance figures for U.S.D. #501 reflect an enduring integrated nondiscriminatory system of education. Although racial balance has not be achieved, students are not separated on the basis of race. Thus, a vestige of segregation has been eliminated.

B. Student Transfer Policy.

The evidence does not suggest that transfers have been permitted to avoid racial mixing. Indeed, in recent years, the student transfer policy has been used to improve racial balance of schools within the district. In 1978, a policy allowing students freedom of choice within the district was adopted. Within two years, the policy was discontinued because it contributed slightly to racial imbalance. In 1980, a majority to minority transfer policy was established. It is still in effect. Under this policy, transfers which do not improve racial balance are disallowed. Therefore, the district

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[9] The number of "racially identifiable" schools (using the ± 15% standard) has increased from nine to fifteen in recent years. But, this increase involves four schools which in their history have crisscrossed the ± 15% threshold and two schools which have had gradually growing minority populations. The increase does not appear to have been caused by district action.

has employed a student transfer policy which encourages integration, not segregation.

C. Optional Attendance Zones.

Students residing in optional attendance zones have the option of attending more than one school. The use of optional attendance zones has been scrutinized because optional zones may allow white students living in racially mixed districts to attend an adjacent white school rather than a racially mixed school. Optional zones were used in Topeka's public schools before 1954. Since 1954, optional zones have been used in racially mixed residential areas and all-white locations. Hence, optional zones, if they had a segregative purpose, were not used solely to segregate. A large number of optional zones were eliminated in 1964. All optional zones were eliminated in 1976. It is difficult to determine the effect of optional zones in U.S.D. #501 without knowing how many children lived in the zones or how children of different races exercised their options. Defendants' expert, Dr. William Clark, estimated, without direct contradiction, that 7.6% of elementary students and 9.2% of junior high students lived in optional zones in the 1963-64 school year. He also concluded the zones did not have a significant segregative effect. The court believes any segregative effect of the zones was slight and does not remain today.

D. Space Additions.

Plaintiffs have criticized the use of space additions, such as portable classrooms, at racially imbalanced schools. Plaintiffs have alleged that school authorities chose to perpetuate segregation at these schools (particularly "white" schools), instead of shifting school boundaries or otherwise reassigning students in a manner that would improve racial balance. For instance, in some cases, additions were made to racially imbalanced schools in areas of residential growth when schools in the more racially mixed central parts of Topeka were becoming underutilized.

The use of space additions was consistent with a race-neutral neighborhood school policy. It was not a widespread practice, for instance, to expand school boundaries and make space additions to allow children to avoid integrated school settings. Nor were students encourages to transfer to segregated schools at which space additions were made. Furthermore, it appears from the report of plaintiffs' expert, William Lamson, that space additions were employed at predominantly white, predominantly nonwhite and racially balanced schools. Ex. 219 at 185. It is possible that actions inconsistent with neighborhood schools could have been taken to avoid space additions and improve racial balance. But, it has not been shown that space additions were intentionally used t promote segregation

or that schools are racially imbalanced today because of space additions.[10]

E. School Closings.

The school closings over thirty years in the district indicate a policy of desegregation. All four *de jure* black schools have been closed. The *de jure* black school (McKinley) in North Topeka, the small area of the city north of the Kansas River, was closed in 1955 and the black children were assigned to Grant or Quincy elementary schools. Grant was closed in 1977. Now all elementary students in North Topeka attend Quincy School. Washington and Buchanan schools were both closed by 1962. Monroe was closed in 1978. The Pierce School was closed in 1959, one year after its attendance zone was annexed into the district. It

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[10] Plaintiffs chose to emphasize that virtually all the portable classrooms placed at the senior high schools were placed at Topeka West High School--the identifiably "white" senior high school in the district. Of course, if portable classrooms had not been placed at Topeka West, the racial identify of the school would not have changed. Instead, more students would have attended the other high schools which may have had a better racial balance, but which were probably overcrowded. Plaintiffs have not denied the overcrowding problems experienced at the high schools. Nor was the feasibility of placing portable classrooms at other schools well established. Placing portable classrooms at Topeka High, the school adjacent to Topeka West, would have been very difficult. Even by plaintiffs' standard, Topeka West is now on the threshold of racial balance. Therefore, the placement of portable classrooms at Topeka West has not prevented desegregation.

was an all-black school. When Parkdale was closed in 1978, it had a minority student population of 85.62%. Three schools in central Topeka closed with relatively high minority populations--Van Buren (1964, 40% est.); Central Park (1980, 42.9%); Polk (1979, 48%). Three schools with relatively low minority populations have been closed--Dawson (1966, 0% est.); Sheldon (1977, 3%); Landon Middle School (1986, 9.2%). Three schools were closed when they had minority populations near the district average--Rice (1981, 33.5%); Grant (1977, 21%; Clay (1975, 25.3%).[11]

Although a few schools with desireable racial balances have been closed, there is no pattern of closing schools to avoid racial mixing. Indeed, on the whole, the closing of schools appear to have been an integrative device.

F. School Opening.

Several schools with virtually all-white enrollments opened in the 1950s or early 1960s. These schools included McClure, Sheldon, McEachron, McCarter, Bishop and Hudson elementary schools, as well as Jardine, Eisenhower and Landon junior high schools, and Topeka West Senior High School. These schools were in areas of residential expansion. During the

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[11] The Lincoln Elementary School was racially mixed when it closed in 1962.

same period, new schools with mixed racial compositions replaced existing facilities at Lowman Hill, Lafayette, Highland Park Central, Central Park and Belvoir elementary schools. The latter two schools were built in 1967. Linn Elementary School was built in 1964 and appears to have had a significant minority enrollment[12] In 1970, French Junior High School opened as a predominantly white school. In 1980, Chase Middle School opened as a racially mixed school and Central Park Elementary School reopened as Robinson Middle School, a racially mixed school.

Although, on its face, the construction of schools, particularly on the west side of the district, appears to have promoted racial separation, the court does not believe that the district's school construction policy was intended to maintain or promote segregation. Most of the construction occurred during the peak years of student enrollment. More schools were needed. The location of the schools in areas of residential expansion was consistent with the race-neutral neighborhood school concept. There is no evidence that the students attending these schools could have been accommodated in the existing schools or that land was available in the older, more racially mixed areas of the district to build new schools.

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[12] In 1966, Linn had a minority population of 5.7% versus a district average of 16.5%. By 1969, the minority enrollment had grown to 12.5%.

Furthermore, the racially mixed schools were not being closed during this period of construction. Instead, new schools were being built in areas of residential integration. The schools being closed were formerly *de jure* black schools or schools with high minority enrollments; the possible exception being Lincoln Elementary School, which was located in an urban renewal site. Finally, over the years there has been increasing residential and school integration in the areas where the once all-white schools were constructed. In sum, it does not appear that the district's school construction policy has promoted segregated residential patterns or segregated schools.

G. Schoolsite Location.

Plaintiffs have criticized the decision to place a high school on the west side of Topeka--i.e., the construction of Topeka West High School in 1960. The evidence is convincing that Topeka West High School was built in response to the overcrowding of Topeka High School and the expansion of the student population in the western parts of Topeka. At the time Topeka West was built, the district had recently annexed a high school serving the east side of Topeka, Highland Park High School. Since Topeka West was built, the district had recently annexed a high school serving the east side of Topeka, Highland Park High School. Since Topeka High was centrally located, a new high school on the west side of the city was a

logical response to overcrowding. If the three high schools were aligned vertically (north to south) on a map and had attendance areas for each school which included east, west and central Topeka, then the high schools of the district would be more racially balanced. But, there has not been a persuasive showing that this alternative was practical or necessary to avoid the separation of white and black high school students in the district. The court believes the siting of Topeka West High School was a race-neutral decision.

H. School Boundary Location.

A review of the school boundaries as they have developed over thirty years does not reveal a segregative pattern that remains today. The boundaries set around the former *de jure* black elementary schools after this case was remanded by the Supreme Court appear to have perpetuated the racial identity of those schools. But, the schools have long been closed and the segregative effects of those boundaries have attenuated entirely.

By and large, the school attendance boundaries of the district reflect a commitment to neighborhood schools. Schools are centrally located in their attendance areas. Some attendance areas, e.g., Gage, McCarter, McClure, Stout, Quinton Heights and State Street, are long. But, these areas include large land tracts without residential population.

The attendance zones of schools with high minority populations are not gerrymandered to produce this result. In general, schools with high minority populations are not in areas with an average or higher than average white population. Nor are they near low minority schools in areas of average racial mixture.

Belvoir Elementary School is centered in an area with a high minority population. It is surrounded by other schools with higher than average minority populations. It is not *the* black school in a racially mixed area. It is a school with a higher than average black student population in a residential area with a higher than average black population. Highland Park North Elementary School, Lafayette Elementary School and Hudson Elementary School are similarly situated.

Quinton Heights and Avondale East elementary schools have higher than average minority populations, but they are surrounded by schools with mostly average to higher than average minority percentages.

Perhaps the most suspect school is Lowman Hill Elementary School. Lowman Hill has a higher than average minority population, but it is bordered on three sides by schools with lower than average minority populations (Potwin, Gage and Randolph). It is also bordered by Sumner Elementary School which is slightly above the district average for minority population. Although Lowman Hill has had a higher than average minority population, it has never had a majority minority population, and its minority percentage has been within fifteen percent of the district average in recent years.

Lowman Hill is centrally located within its attendance area, as are the schools which surround it. Its boundaries include two historically black residential areas which are closer to the Lowman Hill School than the other schools in the area. The boundaries of Potwin and Gage have remained relatively stable over twenty years. The boundaries of Randolph and Sumner have been expanded to increase the minority populations of the schools. Although Gage and Potwin have been predominantly white schools since the Supreme Court's decision in this case, the court cannot say that Lowman Hill is an isolated black school or vestige school when its boundaries for two decades have been consistent with the neighborhood school concept; it has never had a majority minority student populations; and, in recent years it has been relatively close to the district average for minority enrollment.

One of plaintiffs' criticisms of the district's course of desegregation is that schools with a higher than average minority population have been assigned students from closed schools that had even higher minority populations. For instance, Quinton Heights ultimately received students from Monroe. Lafayette and Highland Park North received students from Parkdale. Again, this is a product of a race-neutral neighborhood school concept. Students from closed schools were sent to nearby schools. Racial balance would have been improved to a greater degree if students from a closed school with a high minority

population were transported to a noncontiguous attendance area with a low minority population, or if white children were transported the opposite direction. But, this would have breached the neighborhood school policy consistently applied by the district. Plaintiffs' witness testimony also suggested that boundaries could shift in more than one attendance area (in a ripple effect) to more evenly distribute the minority student population after a school with a high minority population was closed. The feasibility of such a plan was not convincingly established in the evidence. Obviously, such efforts would detract from the central location of schools in their attendance areas and, to some extent, diminish the advantages of neighborhood schools.

In summary, the district's attendance zones are not segregatively gerrymandered. The district has consistently applied race-neutral, neighborhood school principles to the demarcation of attendance zones.

I. History of the Schools.

To reiterate, none of the four former *de jure* black elementary schools are open. Three of the four were closed by 1962. The fourth was closed ten years ago. Of the eighteen white elementary schools operating in 1954: seven have been closed; three have minority populations between five and ten percent; three have minority populations between forty and fifty percent; the remaining five schools have minority populations near the district average, between fifteen and thirty-two percent.

A history of the allegedly racially identifiable nonwhite schools follows.

Belvoir. The Belvoir School area was annexed into the district in 1960. The school had an average or slightly above average minority population at the time. In the 1960s, after the construction of two federally-subsidized housing projects in close proximity to the school, the minority population of the school increased to more than fifty percent. The minority student percentage continued to rise in the 1970s. After the Rice School was closed in 1981 and part of its population was combined with Belvoir, the minority percentage declined to sixty to sixty-five percent. In sum, Belvoir was a racially balanced school which became a majority black and minority school with the influx of minority residents into the attendance area. The increase of minority students at Belvoir was not caused by the school district. Indeed, the school district has taken action to modify the racial imbalance that exists at the school.

Hudson. When Hudson was constructed in 1963, it was an all-white school. After the construction of subsidized housing projects in the Hudson attendance area, and with the general increase of minority residents on the east side, Highland Park area, the minority student population of Hudson grew rapidly in the late sixties and early seventies. In 1983, the minority student population of Hudson exceeded forty percent for the first time.

Avondale East. The land representing the Avondale East attendance area was annexed into the district in 1959. In the 1967-68 school year, the school had a minority population of sixteen percent. The minority population grew rapidly in the following few years and then stabilized in the 1970s in the thirty to thirty-five percent rage. In 1984, the school exceeded forty percent in minority population for the first time. The school boundaries of Avondale East and Hudson have been relatively stable through the years. The increase in minority population at both schools appears to be the result of residential movement.

Highland Park North. The Highland Park North attendance area was annexed by the district in 1959. In the 1967-68 school year, the school had a minority student percentage of thirty percent. The average for the school district's elementary student population was seventeen percent. The minority percentage increased with the movement of minority residents to the attendance area. In 1978, with the addition of a large part of the Parkdale attendance area, the minority student percentage of Highland Park North grew from forty-seven to fifty-eight percent. When it closed, Parkdale had a minority percentage of 85.6%. In 1954, Parkdale was an all-white school located near the *de jure* black Washington School. After the Supreme Court decision in 1955, Parkdale enrolled a minority population of 14.7%. This increased to twenty-four percent to 1956. When Washington was closed, its attendance area was added to the Parkdale district. Of

course, this increased Parkdale's minority population significantly. Parkdale became a predominantly black school. When Parkdale was closed, its attendance area was split between the two closest schools--Highland Park North and Lafayette. Since 1978, the minority percentage at Highland Park North has remained around fifty-eight percent. Approximately fifty percent of the minority student population is black. The school district has contributed to the racial imbalance at Highland Park North only to the extent that it closed a school with a much higher minority percentage and assigned some of the students to Highland Park North.

Lafayette. Lafayette was an all-white school prior to the end of *de jure* segregation. In 1955, it had a minority population of 8.4%. This increased the following year to 13.7%. By 1968, the minority percentage at Lafayette was fifty-nine percent. When Parkdale was closed, Lafayette received part of the Parkdale attendance area. As a result, Lafayette's minority percentage increased from sixty-two to sixty-six percent. This figure has decreased in subsequent years. One factor in the decline may have been the assignment of part of the Rice School attendance area to Lafayette in 1981. For the last five years, Lafayette has had a minority population of fifty-six to fifty-nine percent. It should be noted that Lafayette has had a significant nonblack minority population. In the 1967-68 school year, the school had a twenty-nine percent nonblack minority percentage. In the 1985-86 school year, the school had a fifteen percent nonblack minority percentage.

Quinton Heights. Quinton Heights was an all-white elementary school prior to the end of *de jure* segregation. In 1955, it had a minority percentage of 2.8%. This increased to 7.26% the following year. By 1968, the minority population had increased to thirty-five percent. In September 1979, after the closing of Monroe and Polk Elementary Schools, Quinton Heights acquired the Monroe school attendance area. Its minority percentage increased to fifty percent in 1979. The minority percentage was approximately the same in 1985.

Lowman Hill. Lowman Hill Elementary School was an all-white school located near the *de jure* black Buchanan School prior to the Supreme Court decisions in this case. In 1955, Lowman Hill had a black population of 11.4%. This increased to 17.4% the following year. In 1959, Buchanan was closed, and its students were assigned to a new school at the Lowman Hill site. Plaintiffs' expert testimony estimated that this increased Lowman Hill's minority percentage to forty-three percent. Since that time, Lowman Hill's attendance area has been expanded to include parts of the Clay, Polk and Central Park attendance areas. For the last five years, Lowman Hill's minority student population has fluctuated between thirty-six and forty-one percent.

Eisenhower Middle School. This attendance area was annexed into the district in 1959. In the 1967-68 school year, Eisenhower Junior High had a minority percentage of 5.78%. This increased to twenty percent

in 1974 and twenty-nine percent in 1977. After the change to the middle school system in 1980, Eisenhower Middle School was one of six middle schools in the district and had a minority percentage of forty-five percent--approximately twenty percent above the district average for middle school students. In 1985, the minority percentage at Eisenhower Middle School was 48.6% and the district's minority average for middle school students was 26.9%.

To summarize, none of those schools plaintiffs allege to be racially identifiable nonwhite had been racially identifiable by plaintiffs' measures throughout the history of this case. Two factors have contributed to the increase of minority students at these schools. First, for all of the schools, there has been an increased percentage of minority residents in their attendance areas. In other words, the attendance areas have undergone a racial transition not caused by district action. Second, some of the schools have been affected by the expansion of attendance areas to include the attendance zones of schools with large minority populations. On the whole, the closing of the highly imbalanced schools had a desegregative effect upon the district's operation, although it aggravated the imbalance of nearby schools. The assignment of students from areas of minority concentration to nearby schools with higher than average minority populations was consistent with the race-neutral neighborhood school policy of the district. There has been no showing that assigning the student populations of the

closed schools to other adjacent attendance zones would have significantly improved the racial balance of the district today.

Plaintiffs have also alleged that several schools are racially identifiable as white schools. Two of the allegedly identifiable white schools are Gage and Potwin elementary schools. These schools were all-white before and after the Supreme Court decision in this case. In 1967, each school had only one minority student. In 1985, Gage had twenty-five minority students--9.47% of its student population; Potwin had eighteen minority students--7.77% of its student population. There are other elementary schools with low minority percentages: Bishop (10.5%); Crestview (8.9%); McCarter (9.16%); McClure (7.21%); McEachron (10.31%); Whitson (10.22%). These schools are located in west or southwest Topeka where there has been steady residential development over thirty years. All of the schools, like Gage and Potwin, have experienced increasing minority student populations. All of the schools, including Gage and Potwin, have had relatively stable attendance boundaries. One of plaintiffs' witnesses testified that if trends continue, the secondary schools which serve the western part of Topeka will become racially nonidentifiable, as measured by minority student percentage. One can assume that this may also occur in the elementary schools serving the same area. In sum, the district has several schools which historically have had low minority populations. These minority

populations are growing, however, without opposition by the school district.

J. Facilities.

There is no significant disparity in the quality of facilities available in schools throughout the district.

K. Extracurricular Activities.

There is no discrimination in the conduct of extracurricular activities in the district. Indeed, multiracial participation is guaranteed in certain activities such as cheerleading and student government.

L. Curriculum.

There is no significant disparity in the curriculum and progress of study in the schools throughout the district. In recent years, the district has taken diligent and meticulous steps with the development and use of curriculum guides to assure that all schools and all grades work consistently toward specific and uniform academic goals.

M. Transportation.

There is no discrimination in the provision of transportation in the school district.

N. Faculty and Staff.

Plaintiffs demonstrated that in the years immediately following the Supreme Court decisions, the district discriminated in the hiring and placement of minority staff. In 1963, however, the district passed a resolution against discrimination in the hiring and employment of personnel. At least since 1976, the district has had an affirmative action program and has tried to recruit minority faculty and staff.

In the 1985-86 school year, the district's work force was 12.1% minority. Minority employees were represented at all levels of the work force. Twenty percent of the service workers were minority members. Approximately fifteen percent of the managerial workers were minority members. The current superintendent is a black man, as are the principals of two of the three high schools (Topeka West High School and Highland Park High School). No criticism of the district's affirmative action policy has been made in this case. Nor have the district's hiring policies in recent times been shown to be discriminatory.

Plaintiffs' major contention with regard to faculty and staff is that the assignment of faculty and staff has served to racially identify schools in the district. Plaintiffs have demonstrated that in general there are a greater than average number of minority faculty and staff in schools with a greater than average number of minority students. Elementary schools with minority enrollments greater than fifteen percent of the district

average had fifty-three percent of the minority staff at all the district's elementary schools in 1985.[13] Elementary schools with minority enroliments greater than fifty percent had twenty percent of the minority staff at all the district's elementary schools. Elementary schools with minority enrollments less than fifteen percent of the district average had sixteen percent of the district's minority staff at elementary schools.

In the 1985-86 school year, minority staff assignments at the elementary schools ranged from zero percent at McClure to thirty-three percent at Avondale East.[14] These figures have varied over the years, however. During the last ten years, both Avondale East and McClure have had minority staff percentages very close to the district average. In the 1977-78 school year, Avondale East had a minority staff percentage of 14.6%; one year later, the figure was 9.8%. In the 1979-80 school year, McClure had an 11.6% minority staff.

At the high school and middle school levels in the 1985-86 school year, minority staff percentages ranged from 24.7% at Robinson Middle School to 2.5% at

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[13] The "faculty and staff" data available to the court are for the school years 1973-74 to 1985-86. The data lump together faculty and other employees assigned to the schools. Figures for faculty assignments only are available for the 1981-82 school year alone.

[14] The minority staff percentage for all elementary schools was 11.23%.

Topeka West High School.[15] Again, these percentages have fluctuated. In the 1984-85 school year, Topeka West had a 7.5% minority staff. In the 1980-81 school year, Robinson Middle School had a 9.1% minority staff--a figure below the district average for that school year.

In the 1985-86 school year, Belvoir, with the highest minority elementary student percentage, and Potwin, with the second lowest, had virtually equal minority staff percentages. Highland Park High School, with an above average minority student percentage had a below average minority staff percentage. The sole secondary school with a minority enrollment greater than fifteen percent of the district average (Eisenhower Middle School), had only fourteen percent of the minority staff at the secondary level. Thus, there are clear exceptions to the trend demonstrated by plaintiffs.

Moreover, the difference between having a greater than average number of minority staff and having a less than average number of minority staff is very small in most cases. Only six schools in 1985 had minority staff percentages beyond $\pm$ 10% of the district average for elementary and secondary schools.[16] Three of

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[15] The minority staff percentage for all high schools and middle schools was 12.65%.

[16] The $\pm$ 10% range was a remedial target approved by the court and the parties in *United States v. Texas Education Agency*, 649 F.2d 1104 (5th Cir. 1982). See also *Board of Education v. Dowell*, 375 F.2d 158

these schools were within eleven percent of the district average. Furthermore, all of the schools have been within the ±10% range in the last ten years.

Perhaps as important as the racial percentages of the faculty and staff is the fair assignment of qualified and dedicated faculty throughout the district. The principals assigned to two schools with relatively high minority student percentages, Highland Park North and Lafayette, have received awards recognizing their work. Furthermore, while there was some testimony that black students have not always been motivated by faculty to fulfill their potential, in recent years it appears that the school administrators and teachers have been dedicated to the belief that all children can learn and achieve.

Examining the school system as a whole, despite the tendency to have more minority staff in schools with a greater than average minority student population, the court does not believe the district's assignment policies serve to identify schools as intended for white or black students. The pattern identified by plaintiffs is not monolithic. The current percentages of minority staff in the district's schools are generally within ranges acceptable to other courts in desegregation litigation. Other facets of faculty and staff policies are nondiscriminatory. In sum, the record before the court with regard to the district's approach to faculty and staff is not indicative of a dual system of education.

(10th Cir. 1967).

O. Community Attitudes.

Plaintiffs employed an opinion survey corporation to survey Topeka residents about their attitudes towards the schools in U.S.D. #501. Four hundred interviews were conducted by telephone from August 27, 1984 through September 1, 1984. The survey attempted to focus upon the opinions of adults who had or recently had children in the Topeka school system. One of the conclusions of the survey was that people in the community perceive some schools as "black" or "minority" schools and other schools as "white." The survey also found that the schools perceived by the respondents in the survey as "white" are also considered better than the schools perceived as "black" or "minority."

Defendants employed a public opinion researcher to critique the survey. Several well-founded objections were made.

The court does not believe the survey results are important to the ultimate issues in this case. At the outset, the court discounts the answers concerning the quality of education or quality of facilities at the schools. The survey's respondents were not education experts. They did not examine the entire school system before stating an opinion. Quite simply, in a case where the court is asked to compare school quality, the opinions of lay persons familiar with only one school or a few schools are not as helpful as the opinions of persons familiar with the entire system.

The questions concerning the racial identity or racial balance of schools seem more pertinent to issues in this case. The questions are related to a goal of desegregation--i.e., to achieve a system "without a 'white' school and a 'Negro' school, but just schools." *Green*, *supra*, 391 U.S. at 442. This goal, however, as represented in the survey questions, could be seen as utopian. The questions could be understood as asking whether people look past race in characterizing a school. While the world would be a better place if people did not see "race," that is not the constitutional standard which governs this case.

As discussed before (see footnote 7, *infra*), racial identity or racial balance are ambiguous terms. In the minds of the experts who testified in this trial, a school in Topeka with three white students to every minority student is a colorless or a racially balanced school. But, it is impossible to determine from the survey how Topeka residents characterize such schools because the survey respondents were not asked to characterize schools with that type of student ratio. They were only asked to characterize schools with much higher than average or much lower than average minority populations.

Furthermore, the responses to these questions were inconsistent. A majority of respondents familiar with Quinton Heights Elementary School and a plurality (49%) of the respondents familiar with Highland Park North Elementary School considered those schools to be racially balanced even though both schools had majority

minority populations at the time of the survey. In contrast, a majority of respondents familiar with Belvoir Elementary School said it was a black school, although its minority percentage at the time was between that of Quinton Heights and Highland Park North. When respondents were asked if the district had black schools and, if so, to identify the schools, two schools relatively close to the district average for minority student population were most often listed as black schools--Highland Park High School and Topeka High School. Most respondents considered Eisenhower Middle School to be racially balanced, although it had the highest minority student percentage of secondary schools at the time of the survey. The only consistent thread to the survey is that schools with 90% white populations were often characterized as white schools. But, there were some exceptions to this rule. For instance, a plurality of respondents familiar with Gage Elementary School thought it was racially balanced even though its white population at the time was approximately ninety-two percent. Moreover, the school most often identified as "white," Topeka West High School, was within twenty percent of the average minority student population.

There were other problems with the survey. For instance, women were overrepresented in the survey. This could have affected the results since male and female answers tended to be different. Other segments of the population were left out or overrepresented. It is uncertain whether this may have altered the results.

Finally, as defendants have noted, only a small percentage of respondents concurred with most of plaintiffs' racial characterizations of schools. For example, only fifteen percent of all the respondents listed Belvoir as a black school; seventy-five percent of the respondents had no opinion. For all the reasons previously listed, the court does not believe the survey of public opinion is strong evidence that segregation remains in U.S.D. #501.

P. Equality of Education.

A part of the trial was devoted to discussion of the harms of school segregation. Plaintiffs presented expert testimony describing the debate on the matter and the outcome of studies in the field. Defendants' expert presented a contrasting view, at least with regard to the effect of desegregation upon students' test scores. This court will postulate that school segregation is harmful because *de jure* segregation is unequivocably illegal.[17]

It should be reemphasized, however, that the issue at this juncture is not the harms of segregation, but whether intentional segregation or its vestiges remain in the district. Assuming that school segregation

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[17] In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 472 (1982), the Court stated: "[I]t should be . . . clear that white as well as Negro children benefit from exposure to 'ethnic and racial diversity in the classroom.'" Quoting *Columbus Board of Education v. Penick*, *supra*, 443 U.S. at 486 (Powell, J., dissenting).

negatively affects test scores of minority students, then reasoning backwards (from effect to cause), evidence of inferior achievement by students in schools with high minority populations may be evidence of a vestige of segregation in the district.

Plaintiffs attempted to prove that a disparity in achievement existed by charting according to school, the sixth grade pass percentages on the Kansas Minimum Competency Tests in reading and math for 1985, and making the same comparison of results on the Iowa Test of Basic Skills for 1984-85. No attempt was made to control for any other factor that might influence achievement. In general, the charts show that classes in schools with low minority populations have higher pass percentages and higher scores on the Iowa Test of Basic Skills than classes in schools with average or higher than average minority populations.

Defendants presented a much more careful and comprehensive examination of the issue.[18] Scores on the Kansas Minimum Competency Tests were followed for the years 1980, 1982, 1983, 1985 and 1986. The results were categorized as to the schools' racial mixture: less than ten percent minority; between ten and forty percent minority; and over forty percent minority. Students' varying ability was controlled for with the use of scores on the Cognitive Abilities Test.

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[18] Ex. 1109, "An Analysis of Black Student Achievement in USD 501 Topeka, Kansas: 1980-1986" by Dr. John P. Poggio.

Income level was controlled for by determining whether a student participated in a free or reduced lunch program. For the year 1986, information was gathered concerning other factors that might affect achievement. A questionnaire was completed by students to obtain information concerning many factors including: parents' education; parents' expectations and support; students' study and work habits; students' reading habits; and students' self-concept. A mobility analysis was also done to track the test scores of students who transferred from one building mixture to another. Approximately 13,000 reading test scores and 13,000 mathematics test scores were examined. Forty-six different analyses were completed.

The conclusion of the study was that the racial composition of schools in Topeka during the period in question did not significantly affect test scores in reading or mathematics. The study further found that movement of students to schools with different racial compositions did not affect proficiency levels. Finally, the study found that many other factors were much more important to achieve than the racial composition of a school.

Plaintiffs criticized defendants' study for improperly controlling for ability. The question was raised as to whether it is possible to control for ability. The court believes, however, that a reasonable and conscientious effort was made by defendants' expert to determine what effect, if any, the racial composition of the district's schools has upon student achievement. The

study was characterized by an expert in the field, other than the author of the study, as "one of the most comprehensive, largest and most scientifically sound studies" that has been made on these issues. Tr. 2396. Although the results of the study are subject to the national debate which has endured for years on this issue, the most persuasive evidence *at this trial* indicates that the racial composition of the district's schools has an insignificant impact on student achievement. Thus, inferior achievement, as a vestige of segregation, has been eliminated.

Q. Opportunities for Desegregation.

The failure to take desegregative action by a district that had an affirmative duty to desegregate should be carefully examined by the court. If a district has consistently dragged its feet on desegregation, then the vestiges of the segregated system may remain.

The Board of Education of Topeka's public schools did not implement a race-conscious student assignment plan following the Supreme Court decisions in this case. The law, as interpreted by this court upon the remand of this case, did not appear to require this action. Nevertheless, the closing of three formerly all-black schools, the enrollment of black students at formerly all-white neighborhood attendance centers, and the inclusion of white residences in the attendance area of the fourth formerly all-black elementary school, had noticeable desegregative results. One of plaintiffs'

experts suggested a walk-in desegregation plan was feasible in 1955 and would have produced better results. Ironically, the current attendance zones for elementary schools in central Topeka are not radically different from the walk-in pattern suggested by plaintiffs' expert.

In 1968, with the *Green* decision, and three years later with the *Swann* decision, it became clear that a race-neutral neighborhood school system would not satisfy the legal duty to desegregate unless it effectively desegregated student attendance patterns. In 1974, the Department of Health, Education and Welfare (HEW) brought an administrative complaint against U.S.D. #501 over the district's desegregation. The complaint was dismissed with the district's initiation of short-range and long-range proposals involving the closing of schools, construction of facilities and establishment of middle schools. Schools with the highest minority percentages were closed. Still, a few schools with majority minority student populations remained. During the time that action in response to the HEW suit was considered, the rough outlines of a plan to eliminate all majority/minority schools was developed at the request of the Board of Education. It was not pursued in favor of the long and short-range proposals which were more consistent with neighborhood schools, but still satisfied HEW.

Plaintiffs have asserted that one result of the district's desegregation effort in the 1970s was the completion of Quinton Heights' transformation into a

racially identifiable school. Plaintiffs contrast Quinton Heights with the adjacent Stout School. Stout's minority population is approximately twenty percent less than Quinton Heights' minority enrollment. Still, Stout's minority percentage is very close to the district average. Thus, by plaintiffs' definition, it is not a "white" school bordering a "black" school. Moreover, the opportunity for further "desegregation" of these schools within the framework of smaller neighborhood schools is not apparent from the testimony or exhibits in this case.

In 1984, the Board of Education developed "Plans N and X" which represented a departure from the smaller neighborhood school system. Several goals and justifications unrelated to school desegregation were suggested for the plans. But, one of the plans' "assumptions" was that all majority minority schools would be eliminated.

Plan N required closing two middle schools and sixteen elementary schools. Two new elementary schools would be built, and one of the middle schools would be converted to an elementary school. The total construction cost of the proposal over a five-year period was estimated to be $13.2 million, although significant annual operating savings were projected.

Plan X required closing four middle schools and seventeen elementary schools. One new middle school and one new elementary school would be built. Four middle schools would be converted to elementary schools. The cost of construction was estimated to be

$15.4 million, although, again, significant operating savings were forecast.

Under Plans N and X, it was projected that no school's minority enrollment would exceed forty-five percent. In each plan, however, there would be two elementary schools with a white enrollment exceeding ninety-five percent, and at least four schools with white populations of approximately ninety percent or more.

The Board conducted public meetings in all parts of the district for comment upon the plans. Public reaction was uniformly and vigorously negative. No significant segment of the population supported the plans. Because of the hostile reaction to the plans, further consideration of the plans was dropped. No vote was ever taken upon them.

Public reaction to the plans indicated a desire to maintain smaller neighborhood schools. No evidence established that the opposition to Plans N and X, or the failure to implement the plans, was racially motivated.

The court does not believe the district's conduct over thirty years indicates a desire to perpetuate segregation by foregoing opportunities to desegregate schools. After the Supreme Court mandated that children be admitted to schools on a nondiscriminatory basis, the district completed efforts to apply a race-neutral neighborhood school attendance system to all students. This produced substantial integration. After the Supreme Court encouraged race-conscious efforts to eliminate the vestiges of segregation and HEW

challenged the progress of desegregation in the district, additional action was taken to improve the racial balance of the student bodies in the district. In recent years, the Board of Education has demonstrated a sensitivity and commitment to maintain and improve integration within the district by drafting long-range proposals with racial mixing goals in mind. The district's efforts to desegregate have been helped by increased residential integration. The district has not bucked the demographic forces that have improved the racial balance of schools.

At any time, more could have been done to achieve racial balance in the schools. But, it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday. More should be done to improve racial balance in the schools if the existing imbalance follows from defendants' past intentional segregative conduct. The district's history of action or inaction toward racial conditions in the district does not suggest that the racial imbalance of the schools derives from the *de jure* system or a foot-dragging segregationist policy.

R. Other Factors.

Since 1976, members of the Board of Education of U.S.D. #501 have been elected through a district system which improves the opportunities for minority membership on the Board. There have been minority members on the Board for several years serving in

positions such as President of the Board, where vigorous and effective leadership has been displayed. The Board of Education currently has minority representation.

The district administers various events and programs to encourage interracial contact and ethnic awareness. One notable program is the Topeka Adventure Center. All fifty-grade students attend the Center for two weeks in groups of approximately 100. The groups are balanced by sex, race, geographic part of the city and socioeconomic level. The Center emphasizes student initiative, participation and cooperation in a variety of activities organized in a microcosmic, nonclassroom setting.

S. Summary.

In conclusion, after reviewing a multitude of factors which bear on the issue, the court is convinced that students in U.S.D. #501 are admitted to school and educated on a nondiscriminatory basis. There is no illegal, intentional, systematic or residual separation of the races.

Plaintiffs appear to be arguing for a judicial fine-tuning of the desegregation process in U.S.D. #501. As compared with many desegregation cases, relatively small changes in student and staff assignment would create the balance which plaintiffs define as desegregation. Blind reliance upon statistical measures of balance, at least with regard to student assignment,

was persuasively rejected by the Fifth Circuit in *Price*. Although plaintiffs assert other factors in corroboration of their thesis, a careful review of all relevant circumstances establishes that the *de jure* system of segregation has been dismantled and its vestiges eliminated.

The facilities, curriculum, progress of education, extracurricular activities and transportation offered by the district are not distinguishable on racial grounds.

Students of different races attend school together in significant numbers in every part of the district. School attendance is determined by a consistent application of neighborhood school principles. There is no gerrymandering. The race-neutral intent of these principles is untainted by past segregative practices. The court is persuaded that *de jure* segregation either had no significant effect upon residential patterns in Topeka or that its impact on residential patterns has attenuated to insignificance. Thus, the factors which bear on the racial condition of school attendance are the factors which affect residential choice--economic, social and geographic factors--not matters directed by defendants.

Racial balance does not exist in the district's schools. Some schools have a significantly greater minority student population than other schools. The schools with higher or low minority percentages, however, are not the product of *de jure* segregation or convert intentional segregation. They are not isolated

in neighborhoods with contrasting racial complexions. The schools with high minority populations have not been "minority" schools throughout their history. The schools with low minority populations are receiving increasing numbers of minority students. Demographic forces, uncontrolled by defendants, form the racial composition of the schools.

Disparities also exist in the numbers of minority faculty and staff at schools in U.S.D. #501. These disparities, however, are neither so large, nor so consistent that they identify schools as racially segregated.

Regardless of the merits of racial balance, the imbalance perceived in this case is neither unconstitutional *per se*, nor unconstitutional in conjunction with other factors such as community attitudes, test scores, faculty and staff assignment or opportunities for improvement. The record reflects that defendants did not cause the present imbalance by engaging in or perpetuating the vestiges of illegal race-conscious conduct. An examination of the school system as a whole reveals an integrated system free of the characteristics of *de jure* segregation.

X. Title VI.

Plaintiffs have premised their action in part upon Title VI of the Civil Rights Act of 1964. This statute prohibits racial discrimination in programs receiving

federal financial assistance. The school district receives federal financial assistance--some of which is applied generally and some of which is earmarked for specific programs. Therefore, Title VI applies to the district.

Title VI, however, only reached intentional discrimination, unless agency regulations promulgated pursuant to Title VI provide otherwise. *Alexander v. Choate*, 469 U.S. 287, 293 (1985). The record does not establish that defendants intentionally discriminate against plaintiffs or that a policy of intentional discrimination has had effects continuing to the present. Nor has a proper case for relief under federal regulations been proved. Plaintiffs have asserted that the district violated 34 C.F.R. §100.3(b)(2). But, the district's student and staff assignment criteria do not have the effect of discriminating against students because of their race or of impairing the education of minority students. Therefore, relief under Title VI is not warranted.

XI. The State Board of Education.

Plaintiffs have alleged that the State Board of Education (SBE) is responsible for the racial conditions within U.S.D. #501, more for what SBE has *not* done than for what SBE has done. When this case was filed, SBE did not exist. The State had a Superintendent of Public Instruction, but this officer did not have general supervisory powers over local public schools. The State's involvement in this case was limited to

defending the constitutionality of the statute which permitted, but did not command, segregation in grades K-6 in Topeka's schools. After this defense failed, the statute was repealed. In 1966, Article 6 of the Kansas Constitution was amended. This amendment provided for the creation of SBE which would supervise elementary and secondary education. The Constitution expressly reserved control of public schools to locally elected school boards, however. See *State ex rel. Miller v. Board of Education*, 212 Kan. 482, 511 P.2d 705 (1973).

This is an official capacity action. The individual members of SBE are being sued in their official capacity for injunctive relief. To prevail in such a suit, plaintiffs must demonstrate that SBE is a "moving force" behind the illegal segregation which they allege. *Kentucky v. Graham*, ___ U.S. ___ (slip op. at pp. 6-7, 1985). It must be established that SBE's policy or custom played a part in the presence of illegal segregation within U.S.D. #501. *Id.* In *Rizzo v. Goode*, 423 U.S. 362, 377 (1976), the Court reversed an injunctive decree involving police conduct in Philadelphia, distinguishing two school desegregation cases (*Brown* and *Swann*) on the grounds that the defendants in *Rizzo* were not shown to have deprived others of their constitutional rights by their *own* conduct.

In this case, plaintiffs have attempted to establish liability of the members of SBE by showing that SBE

failed to police the desegregation process in U.S.D. #501 and failed to provide assistance, guidance and impetus for desegregation. The court finds that SBE *has* been inactive in this area. But, plaintiffs have failed to demonstrate that the policy or custom of SBE is a root cause or moving force behind the racial conditions which currently exist in the district. There has been no showing that the conduct of SBE has deprived plaintiffs of their constitutional rights. The responsibility for student and staff assignment as well as for the equalization of educational opportunity within the district rests with the local school board. The State has repealed the legislation authorizing segregation. Legislation prohibiting discrimination has been enacted. Any residue of segregation traceable to the repealed statute has been eradicated in the court's opinion. For these reasons, the court believes SBE is not responsible for the racial conditions present in the district.

XII. Conclusion.

U.S.D. #501 provides a high-quality educational opportunity to its students on a nondiscriminatory basis. There is no significant or consistent disparity in the faculty and staff, facilities, transportation or extracurricular activities available to students. Students are assigned to schools on a race-neutral basis. The district's neighborhood school approach has achieved a high level of integration, but not racial balance by any measure. The racially imbalanced schools are not the

product of overt or covert intentional segregative conduct. The court is convinced after reviewing a multitude of factors that the vestiges of past segregation in the district have been dissolved by time, demographic change and the district's steady course of race-neutral and integrative action. This case has reached an appropriate denouement. The district has a unitary system of education.[19]

Accordingly, plaintiffs' claims for relief are denied.

IT IS SO ORDERED.

Dated this 8th day of April, 1987 at Topeka, Kansas.

Richard D. Rogers
United States District Judge

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[19] Under *Dowell v. Board of Education*, 795 F.2d 1516 (10th Cir. 1986), the original order to desegregate remains effective.

92-1568

No.

Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNIFIED SCHOOL DISTRICT NO. 501,
SHAWNEE COUNTY, KANSAS

Petitioner

v.

CHARLES SMITH & KIMBERLY SMITH,
MINOR CHILDREN, BY THEIR
MOTHER AND NEXT FRIEND,
LINDA BROWN SMITH, et al.

Respondents

APPENDIX VOLUME II
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

K. GARY SEBELIUS*
ANNE L. BAKER
WRIGHT, HENSON, SOMERS,
SEBELIUS, CLARK & BAKER
100 S.E. 9TH STREET, 2ND FLOOR
P.O. BOX 3555
TOPEKA, KANSAS 66601-3555
(913) 232-2200

*Counsel of Record

April, 1993

APPENDIX

Volume I
[bound following the
Petition for Writ of Certiorari]

Memorandum Decision of United States District Court for the District of Kansas, filed April 9, 1987 . . . . . 1a

Volume II

Majority Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1b

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed December 11, 1989 . . . . . 1c

Order on Petition for Writ of Certiorari, United States Supreme Court, filed April 20, 1992 . . . . . 1d

Majority Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . . 1e

Dissenting Opinion of the Tenth Circuit Court of Appeals, filed October 27, 1992 . . . . . 1f

Judgment of the Tenth Circuit Court of Appeals, entered October 27, 1992 . . . . . 1g

Order Denying Motion for Rehearing with Suggestion for Rehearing En Banc, Tenth Circuit Court of Appeals, filed January 28, 1993 . . . . . 1h

Constitutional and Statutory Provisions Involved--The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d 1i

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al.,
Plaintiffs,
and

CHARLES SMITH and KIMBERLY SMITH, Minor Children, By Their Mother And Next Friend, LINDA BROWN SMITH, et al.,
Intervening Plaintiffs/ Appellants,

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al.,
Defendants-Appellees.

No. 87-1668

Filed December 11, 1989

Appeal from the United States District Court
for the District of Kansas
(D.C. No. T-316)

Christopher A. Hansen (Richard Jones, Charles Scott, Sr., Charles Scott, Jr., and Joseph Johnson with him on the brief), American Civil Liberties Union Foundation, for Plaintiffs-Appellants.

Dan Biles, of Gates & Clyde, Overland Park, Kansas, Carl Gallagher, Assistant Attorney General (Robert T. Stephan, Attorney General with him on the brief), Topeka, Kansas, and K. Gary Sebelius (Ann L. Baker, Charles D. McAtee and Charles N. Henson with him on the brief) of Eidson, Lewis, Porter & Haynes, Topeka, Kansas for Defendants-Appellees.

Before MCKAY, SEYMOUR, and BALDOCK, Circuit Judges.

SEYMOUR, Circuit Judge.

"[O]nce you begin the process of segregation, it has its own inertia. It continues on without enforcement."[1] This comment by one expert on segregation in schools succinctly summarizes the state of affairs in Topeka. As a former *de jure* segregated school system, Topeka has long labored under the duty to eliminate the consequences of its prior state-imposed separation of races. *Brown v. Board of Educ.*, 349 U.S. 294 (1955). The district court concluded that Topeka has fulfilled that duty, and that the school system is now unitary. Because we are convinced that Topeka has not sufficiently countered the effects of both the momentum of its pre-*Brown* segregation and its subsequent segregative acts in the 1960s, we reverse. Specifically, we hold that the district court erred in placing the burden on plaintiffs to prove intentional discriminatory conduct

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[1] Statement by William Lamson during trial. Rec., vol. II, at 162-63. Mr. Lamson has done demographic studies in desegregation cases since 1970. His services as an expert have been utilized by the Department of Justice, the Department of H.E.W., the N.A.A.C.P., the A.C.L.U., and various school boards. Rec., supp. vol. 12 pl. ex. 25. In 1975, the defendant Board of Education hired him to put together a ten-year forecast of student enrollments. Rec., vol. II, at 103.

The district court echoed Mr. Lamson's view about the nature of segregation: "[R]acially conscious student assignment with the goal of racial balance has been approved as a remedy in desegregation litigation. *This is because school segregation has an inertia which often cannot be countered by a purely neutral force.*" *Brown v. Board of Educ.*, 671 F.Supp. 1290, 1297 (D.Kan. 1987) (citation omitted) (emphasis added).

rather than according plaintiffs the presumption that current disparities are causally related to past intentional conduct. We are convinced that defendants failed to meet their burden of proving that the effects of this past intentional discrimination have been dissipated. We also reverse the district court's holding that the Topeka school district has not violated Title VI. However, we affirm the court's dismissal of the Governor of the State of Kansas and its ruling that the State Board of Education bears no liability for segregation in Topeka's schools.

I.
LEGAL HISTORY

Prior to 1954, a Kansas statute permitted certain cities to maintain separate schools for white and black children below the high school level. In 1941, however, the Kansas Supreme Court held segregation in Topeka's junior high schools to be unconstitutional. *See Graham v. Board of Educ.*, 114 P.2d 313 (Kan. 1941) (separate facilities not equal). Topeka was thus legally permitted to operate segregated schools only at the elementary level. The Topeka Board of Education operated such a system. In 1951, black citizens of Topeka filed a class action challenging the constitutionality of the Kansas law authorizing school segregation. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*), followed, beginning a new era of American jurisprudence by

bringing an end to the doctrine of "separate but equal" and declaring segregation unconstitutional.

The Topeka Board of Education did not wait for the decision in *Brown I* before taking steps towards desegregating Topeka's elementary schools. It began that process in 1953 by permitting black students to attend two formerly all-white schools. It then gradually increased the number of schools black students might attend. Accordingly, when the Supreme Court considered the question of the relief appropriate in school desegregation cases, it noted that "substantial progress" had already been made in Topeka. *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955) (*Brown II*). On remand, the district court criticized one aspect of the Board's desegregation plan but described it overall as "a good faith effort to bring about full desegregation in the Topeka Schools in full compliance with the mandate of the Supreme Court." *Brown v. Board of Educ.*, 139 F. Supp. 468, 470 (1955). The court retained jurisdiction of the case, and the decision was not appealed.

Nineteen years later, in 1974, the Office of Civil Rights (OCR) of the Department of Health, Education, and Welfare (HEW) notified the Topeka school district that it was not in compliance with section 601 of Title VI of the Civil Rights Act of 1964.[2] After the Topeka Board of Education failed

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[2] Section 601 states:

to adopt a plan designed to remedy the noncomplying conditions identified by OCR, HEW began administrative enforcement proceedings against the Topeka school district. The Board filed suit in federal court and obtained a preliminary injunction against the administrative proceeding on the ground that the district court's 1955 decision was a final order, and that the school district was still operating under that court order and still subject to the court's jurisdiction. HEW was thereby precluded from taking administrative action. *See generally Brown v. Board of Educ.*, 84 F.R.D. 383, 390-91 (D. Kan. 1979). In 1976, the Board submitted a plan acceptable to HEW, and both the administrative proceeding and the suit in federal court were dismissed. The Board implemented the plan over the next five years.

In 1979, a group of black parents and children sought to intervene in *Brown* as additional named plaintiffs on the ground that they were members of the original class and that the original named plaintiffs no longer had a sufficient interest in the

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> "No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. § 200d (1982). The Topeka school district received federal funds through the Kansas State Department of Education.

matter to represent their interests. The intervenors asserted that Topeka has failed to desegregate its schools in compliance with the Supreme Court's mandate, and that the Topeka school district currently maintains and operates a racially segregated school system. Their request to intervene was granted.[3] *See Brown*, 84 F.R.D. 383. A long discovery and motion stage followed the granting of the intervenors' motion.

Trial took place in October 1986. The court found the Topeka school district to be an integrated, unitary school system. *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987). The court also held that the Topeka school district had not violated Title VI of the Civil Rights Act of 1964, dismissed the Governor of Kansas from the case, and found that the State Board of Education bore no liability for racial conditions in the school district. This appeal followed.

II.
BRIEF FACTUAL HISTORY

A. Population Change

In 1950, Topeka's population was approximately 10% black. While Topeka's population grew significantly until 1970 and then dropped, the black percentage of the population

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[3] Linda Brown, a child named plaintiff in the original suit, is now the mother of two intervening child plaintiffs.

remained approximately the same. The Hispanic population of Topeka has been slightly less than 5% since 1970. Other minorities make up less than 1.5% of the population.

The distribution of Topeka's population has changed more significantly than its composition. In general, the outer parts of Topeka, particularly on the western side, have grown considerably in population, while the inner city has declined. Until recently, the western side of Topeka was almost exclusively white. The black population of Topeka was concentrated in a few areas in the center of the city in the 1950s; it has since spread widely throughout the eastern part of the city and has gradually begun to move into the western side of Topeka.

The percentage of black and minority children in the Topeka schools has long been higher than the percentage of blacks and minorities in the Topeka population as a whole and has risen over time. In 1952, black students constituted 8.4% of the total number of students in Topeka. By 1966, the percentage of black students in the Topeka school district was 11.6% and the percentage of minority students was 16.0%. In 1975, black students constituted 14.7%, and minority students 20.9%, of the school population. The latest figures used at trial, those for the 1985 school year, showed 18.4% black and 25.95% minority children in the system.

B. Elementary Schools

In 1951, four Topeka elementary schools were reserved for black children, Buchanan, McKinley, Monroe, and Washington. Eighteen elementary schools educated white children. Black children were bused to their schools; white children attended neighborhood schools. 671 F. Supp. at 1291. Under the four-step plan approved by the district court in 1955, all elementary schools were to be opened by September of 1956 to black and white children under a neighborhood school policy. *Id.* at 1293. As a result of the new neighborhood school policy, three schools remained all- or virtually all-black (Buchanan (100%), Monroe (100%), Washington (99.4%)), and two others became more than 20% black in a school district with a black elementary student population of less than 10%.[4] McKinley was closed.

During the late 1950s, the school district acquired by annexation the Avondale (outer Topeka, south) and Highland Park (middle and outer Topeka, east) school districts as well as other territory on the edges of the district. Existing schools within the acquired area were either primarily white or primarily black. As school enrollments grew and the population began to shift, the school district began to close elementary schools in the inner part of the city and open them in the rapidly growing outer part of

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[4] Rec., ex. supp. vol. 13, pl. ex. 155 B. The record on appeal consists of pleadings, transcripts, and exhibits. We cite them respectively as "Rec., doc. #," "Rec., vol. #," and "Rec., ex. vol. #".

the city. Two of the closed schools were former *de jure* black schools (Buchanan, and Washington); another *de jure* school (McKinley) had already been closed. The new schools were built in the newly acquired white areas and opened with all or virtually all white students.

Racial statistics were not kept in an organized fashion from 1956 to 1966. In 1966, the school district operated thirty-five elementary schools. There were some white students in every school. Minority students were present in thirty-two schools. Nineteen of the schools were 90+% white. An additional seven schools were 80-90% white. Four schools were more than 50% minority, and a fifth was almost 50%. The highest percentage of minority students was 93.1% (Parkdale), and the lowest was 0% (Lyman, McEachron, and Potwin). Sixty-five percent of white students attended 90+% white schools and an additional 18.7% attended 80-90% white schools. Close to half of all minority students attended 50+% minority schools.[5]

A second major reorganization of the elementary schools took place in the late 1970s, after the HEW complaint was filed. Eight elementary schools closed over a six-year period, including the last of the four former *de jure* black schools (Monroe). In September 1982, when the reorganization had ended, minority and white

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[5] Rec. ex. vol. IV, at 54-56.

students were present in each of the district's twenty-six elementary schools.[6] Five schools were 90+% white, and another seven were 80-90% white. Four schools were 50+% minority, two of them were schools that had been 50+% minority since 1966. The highest percentage of minority students was 60.6% (Highland Park North), and the lowest was 3.4% (McClure). Close to one-quarter of all white students attended the 90+% white schools, and another third attended 80-90% white schools, totalling 58% overall. The percentage of minority students in 50+% minority schools was 35.5%.[7] This was the status of the elementary schools three years after plaintiffs moved to intervene in this lawsuit on the grounds that the school system had not met its mandate to desegregate.

With one or two exceptions, the relative percentages of white and minority students in the elementary schools have changed only by two or three percentage points since that time. The most significant change is that the schools with the highest white percentages have gained some minority students. Thus, in 1985, the lowest percentage of

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6 Lyman elementary school had been deannexed in 1967. Rec., vol. III, at 281.

7 Rec., ex. vol. IV, at 134-38.

minority students in any school was 7.2% (McClure).[8]

C. Secondary Schools

In 1954, the Topeka school district operated six junior highs and one high school. Two schools were 90+% white, and three were 80+% white. The estimated percentage of black students at the junior high schools ranged from 1.7% (Roosevelt) to 30%

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Percentage of Minority Students
In Topeka Elementary Schools In 1985

School	%	School	%
Avondale East	44.1	Lundgren	15.8
Avondale West	16.6	McCarter	9.2
Belvoir	61.9	McClure	7.2
Bishop	10.5	McEachron	10.3
Crestview	8.9	Potwin	7.7
Gage	9.4	Quincy	20.5
Highland Park Central	35.1	Quinton Heights	49.4
Highland Park North	57.9	Randolph	14.8
Highland Park South	28	Shaner	20.7
Hudson	46.55	State Street	26.3
Lafayette	56.8	Stout	26.8
Linn	29.4	Sumner	31.5
Lowman Hill	41.9	Whitson	10.2

27.2% of all elementary students in 1985 were minorities.

Source: Rec., ex. vol. IV, at 170-74.

(East Topeka).[9] While the dissent emphasizes that segregation was not mandated by law for the secondary schools when *Brown I* was decided, and the student bodies were racially mixed, Linda Brown Smith testified that the junior high school she attended in 1955 (Curtis) had an all-white faculty.[10] When she entered Topeka High school, she recalls that it had one black faculty member.[11]

During the late 1950s-early 1960s period of annexations and building, two junior high schools joined the school system, and three junior highs were built. At the high school level, Highland Park high school was annexed, and Topeka West high school was built. All of these schools were in the newly acquired white outer part of the school district and opened as white or primarily white schools. 671 F. Supp. at 1299.

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[9] Rec., vol. III, at 306-07. Plaintiffs' expert Lamson used the figures for black rather than minority students in his analysis and testimony. Where we repeat his figures, we therefore refer to black students and white students. We also refer to black students when we discuss pre-1966 numbers, as it is only in that year that figures begin to be available for minority students generally. Otherwise we refer to minority students. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 197 (1973). The parties are in agreement that the difference in analysis between black students and minority students is not significant in this case. Rec., vol. IV, at 409-10; rec., vol. V, at 598, 602-03.

[10] Rec., vol. VII, at 1050.

[11] *Id.* at 1051.

In 1966, there were thus eleven junior high and three high schools. At that time, the average minority percentage for the junior high and high schools was 15.3% and 14.9%, respectively.[12] Of the junior highs, five had 90+% white students and another three had 80-90% white students; one had 50+% minority students. The highest percentage of minority students at one school was 61.8% (East Topeka), and the lowest percentage was 0% (Capper). Of the high schools, Topeka High was nearly one-quarter minority, Highland Park High had close to 15% minority students, and Topeka West had .4% minority students. French junior high school opened in 1970 in the southwestern part of the school district as a primarily white school. 671 F. Supp. at 1299.

The reorganization of the late 1970s in response to the HEW complaint included the junior high schools. Two junior highs closed in 1975. In 1980, five more junior highs closed and two schools were opened as the district shifted from a junior high (6-3-3) to a middle school (6-2-4) format. In 1981, after the end of the reorganization, there were six middle schools in the Topeka school district. Two were 90+% white and one was 80-90% white. The highest percentage of minority students was 45.7% (Eisenhower) and the lowest 5.5% (French). By 1985, the relative percentages at some schools had altered by approximately 5%, but the pattern across

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[12] Rec., ex. vol. II, at 56-57.

the district had not changed.[13] The percentage of minority students at the three high schools was 39.8% (Highland Park), 32.5% (Topeka High), and 5.25% (Topeka West) in 1981, and 33.6% (Highland Park), 30.9% (Topeka High), and 7.9% (Topeka West) in 1985.

III.
THE PARTIES

All of the parties to this case have changed. The original plaintiff children have long since left the Topeka school system. The school district has been reorganized, and the State Board of Education came into existence in 1969. These changes have affected

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Percentage of Minority Students
In Topeka Secondary Schools in 1985

Middle Schools	%	High Schools	%
Chase	33.4	Highland Park	33.6
Eisenhower	48.7	Topeka High	30.9
French	6.2	Topeka West	7.9
Jardine	17.3		
Landon*	9.3		
Robinson	28.5		

The percentage of minority students in all middle schools was 26.9%, while the minority percentage at the high school level was 23.8%.

Source: Rec., ex. vol. IV, at 175-77.

*Landon is now closed.

the posture of the litigation to some extent. The original named plaintiffs represented black elementary school children and their parents. Current named plaintiffs represent black children throughout the school system and their parents. The school district grew considerably in size as the city of Topeka annexed territory, although the school district's boundaries were fixed about 1960 while the city continued to grow. The district was also renamed Unified School District # 501 as part of a state-wide reorganization of school districts in 1965. 671 F. Supp. at 1292. The State Board of Education is the product of a 1966 state constitutional amendment. Its powers differ considerably from those of its predecessor. *Id.*; Brief for Individually-Named Defendants Associated with the State Board of Education at 1, 3-4.

IV.
GENERAL PRINCIPLES OF UNITARINESS

Unitariness is a finding of fact reviewed under the clearly erroneous standard.[14] Before we assess the status of school desegregation in Topeka, we set forth the principles that guide our consideration of the unitariness issue.

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[14] *See, e.g., Riddick v. School Bd. of the City of Norfolk*, 784 F.2d 521, 533 (4th Cir.), *cert. denied*, 107 S. Ct. 420 (1986); *United States v. Texas Educ. Agency*, 647 F.2d 504, 506 (5th Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982); *cf. Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 & n.8 (1979) (whether school district is intentionally operating a dual school system is a question of fact).

The district court defined a unitary school system as "one in which the characteristics of the 1954 dual system either do not exist or, if they exist, are not the result of past or present intentional segregative conduct of" the school district. 671 F. Supp. at 1293.[15] These are necessary ingredients in a unitariness determination because once a violation is found, "[t]he Board has . . . an affirmative responsibility to see that pupil [and faculty] assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'" *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) (*Dayton II*) (quoting *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 460 1979). An additional essential requirement of unitariness, however, is whether "school authorities [have made] every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Bd. of School Comm'rs*, 402 U.S. 33, 37 (1971); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

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[15] The Fifth Circuit defines unitariness as "'a district in which schools are not identifiable by race and students and faculty are assigned in a manner that eliminates the vestiges of past segregation.'" *Monteilh v. St. Landry Parish School Bd.*, 848 F. 2d 625, 629 (5th Cir. 1988) (quoting *United States v. St. Lawrence County School Dist.*, 799 F.2d 1031, 1034 (5th Cir. 1986)).

To determine whether a school district has become unitary, therefore, a court must consider what the school district has done or not done to fulfill its affirmative duty to desegregate, the current effects of those actions or inactions, and the extent to which further desegregation is feasible.[16] After a plaintiff establishes intentional segregation at some point in the past and a current condition of segregation, a defendant then bears the burden of proving that its past acts have eliminated all traces of past intentional segregation to the maximum feasible extent.

A. Current Condition of Segregation

The actual condition of the school district at the time of trial is perhaps the most crucial consideration in a unitariness determination. The plaintiff bears the burden of showing the existence of a current condition of segregation. The case law is decidedly unclear as to the precise meaning of that term.[17] In

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[16] *Cf. Morgan v. Nucci*, 831 F.2d 313, 319 (1st Cir. 1987) (considering number of one-race or racially identifiable schools, good faith on the part of the school district, and maximum practicable desegregation); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 227 (5th Cir. 1983) (considering conditions in district, accomplishments to date, and feasibility of further measures).

[17] The Supreme Court desegregation cases involved school systems in which the degree of segregation was sufficiently great that the parties did not seriously dispute on appeal that the plaintiffs had satisfied their burden on this issue. *See Dayton II*, 443 U.S. at 529 (Dayton public schools "highly segregated by race"); *Wright v. Council of City of Emporia*, 407 U.S. 451, 455

our view, a plaintiff must prove the existence of racially identifiable schools, broadly defined, to satisfy the burden of showing a current condition of segregation. Racially identifiable schools may be identifiable by student assignment alone, in the case of highly one-race schools, or by a combination of factors where the school is not highly one-race in student assignment.

> "What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration."

Keyes v. School Dist. No. 1, 413 U.S. 189, 196 (1973).

(1972) (complete segregation); *Swann*, 402 U.S. at 24 (no challenge to finding of prior dual system); *Green v. County School Bd. of Educ.*, 391 U.S. 430, 435 (1968) (complete racial identification of schools). The issue was potentially more significant in recent circuit cases in which a school district had been under court order for some time and many of the vestiges of prior *de jure* segregation had been eliminated. Even in these more recent cases, however, no clear standard has been articulated. *See Morgan*, 831 F.2d at 319-21 (considering number of one-race schools as part of unitariness determination); *Price v. Denison Indep. School Dist.*, 694 F.2d 334, 347-68 (5th Cir. 1982) (discussing need to consider various factors in determining whether constitutionally violative condition of segregation exists).

Although virtual one-race schools "require close scrutiny," they are not always unconstitutional.[18] *Swann*, 402 U.S. at 26. Their existence in a system with a history of *de jure* segregation, however, establishes a presumption that they exist as the result of discrimination and shifts the burden of proof to the school system. *Id.* The presence of essentially one-race schools is thus sufficient to satisfy a plaintiff's initial burden of showing a current condition of segregation.

Courts have used various standards to define "one-race schools."[19] Standards may appropriately differ from school district to school district because the percentage of minority students may likewise vary.[20] Whatever the minority percentage district-

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[18] Given modern urban demography and geography, one-race schools may well have evolved for reasons beyond school board control. *See, e.g., Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975). Thus, where a school system consists of *de facto* one-race schools, rather than *de jure*, the system is not unconstitutional.

[19] *See Morgan*, 831 F.2d at 320 (listing standards ranging from 70% to 90% and declining to decide whether 80% or 90% is more appropriate for Boston); *Tasby v. Wright*, 713 F.2d 90, 91 n.2, 97 n.10 (5th Cir. 1983) (90% standard for one-race schools; 75% standard for predominantly one-race schools). *Swann* did not define the term "one-race school," presumably because two-thirds of Charlotte-Mecklenburg's black students attended schools that were 99+% black. *See Swann*, 402 U.S. at 7.

[20] *See Morgan*, 831 F.2d at 320 n.7 (rejecting 75% standard in district 72% black); *Castaneda v. Pickard*, 781 F.2d 456, 461 (5th Cir. 1986) (school 97.88% Mexican-American not a vestige of discrimination in district 88% Mexican-American); *Ross*, 699

wide, however, it is clear that a school with 90+% students of one race is a predominantly one-race school.[21] Moreover, this is true whether the students at the school in question are white or minority.[22]

Where racial imbalance in student assignment is still extreme in a system that formerly mandated segregation, appellate courts have reversed findings of unitariness without looking to other factors.[23] However, no particular degree of racial balance is

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F.2d at 220, 226 (affirming finding of unitariness for district 80% minority although 57 out of 226 schools were 90+% one-race); *Price*, 694 F.2d at 336, 339-40 (schools not necessarily racially identifiable in district 88% white although 7 out of 8 elementary schools 90+% white); *Calhoun*, 522 F.2d at 718-19 (85% black district unitary although more than 60% of schools all or substantially all black.

[21] *See Dayton II*, 443 U.S. at 529 n.1; *Milliken v. Bradley*, 418 U.S. 717, 726 (1974); *Ross*, 699 F.2d at 226; *Lee v. Macon County Bd. of Educ.*, 616 F.2d 805, 808-09 (5th Cir. 1980).

[22] *See Morgan*, 831 F.2d at 320; *Tasby*, 713 F.2d at 91 n.2; *Ross*, 699 F.2d at 226; *Price*, 694 F.2d at 364; *Stout*, 537 F.2d at 802.

[23] *See Texas Educ. Agency*, 647 F.2d at 508; *cf. Lee v. Tuscaloosa City School System*, 576 F.2d 39 (5th Cir.) (per curiam), *cert. denied*, 439 U.S. 1007 (1978); *United States v. Board of Educ. of Valdosta, Ga.*, 576 F.2d 37 (5th Cir.) (per curiam) *cert. denied*, 439 U.S. 1007 (1978); *Carr v. Montgomery County Bd. of Educ.*, 377 F.Supp. 1123, 1134 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.) (per curiam), *cert. denied*, 423 U.S. 986 (1975).

required by the Constitution.[24] A degree of imbalance is likely to be found in any heterogeneous school system. Therefore, the existence of some racial imbalance in schools will often not be conclusive in itself.

Where numbers alone are insufficient to define racially identifable schools, courts look to demography, geography, and the individual history of particular schools and areas of the city.[25] While a multi-race school cannot be classified as racially identifiable merely by tallying up the race of the students who attend it, such a school may be racially identifiable "simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities," among other factors. *Swann*,

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[24] *See Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976); *Swann*, 402 U.S. at 24-26.

[25] *See Morgan*, 831 F.2d at 320 (noting difficulty of further desegregating schools located in geographically isolated or heavily black sections of Boston); *United States v. Lawrence County. School Dist.*, 799 F.2d 1031, 1043-44, 1047 (5th Cir. 1986) (considering demography and geography in reversing trial court's refusal to order new student assignment plan). *Price*, 694 F.2d at 347-68 (authoritatively demonstrating that degree of racial balance is only one of many factors to be considered); *Stout*, 537 F.2d 800 (affirming remedy leaving three schools one-race because of geographic isolation and barriers); *cf. Carr*, 377 F. Supp. at 1141 (criticizing formulas for determining racial balance as "highly artificial" and severely disruptive).

402 U.S. at 18.[26] These factors alone can establish a prima facia case of a constitutional violation. *Id.* Therefore, a plaintiff may prove a school to be racially identifiable by factors that may, but need not, include student assignment.

B. The Parties' Burdens

Once a plaintiff has proven the existence of a current condition of segregation, the school district bears the substantial burden of showing that that condition is not the result of its prior *de jure* segregation. Under the relevant Supreme Court decisions, mere absence of invidious intent on the part of the school district is not sufficient to satisfy its "heavy burden" of proof; the district's duty is to act affirmatively, not merely to act neutrally.

> "[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is *the effectiveness, not the purpose*, of the actions in decreasing or increasing the

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[26] *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 196 (1973) (what is a segregated school depends on facts of the particular case; faculty and staff percentages and community and administrative attitudes as well as racial composition of student body are relevant); *Price*, 694 F.2d at 347-68; *Lawrence County School Dist.*, 799 F.2d at 1039-40 (looking to student and faculty percentages and history and location of school).

> segregation caused by the dual system. As was clearly established in *Keyes* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose. The Board has had an affirmative responsibility to see that pupil assignment policies and school construction and abandonment practices 'are not used and do not serve to perpetuate or re-establish the dual school system.'"

Dayton II, 443 U.S. at 538 (emphasis added) (citations omitted). *See also Swann*, 402 U.S. at 26 (burden on school board to establish current racial composition of schools not the result of their present or past actions). The school district must show that no causal connection exists between past and present segregation, not merely that it did not intend to cause current segregation. The causal link between prior and current segregation is not snapped by the absence of discriminatory intent alone, or even by a firm commitment to desegregation, where it is not accompanied by *action* that in fact produces a unified school district. *Id.*

The dissent clearly has misconstrued the parties' burdens. The emphasis throughout the dissent is on the necessity of *plaintiffs proving* a current condition of *intentional* segregation before any burden shifts to the school district. Although the revised dissent has removed a number of its prior references to

"intentional" when discussing "current condition of segregation," and contends that it has not misapplied the burden, the tenor of the current version of the dissent belies this assertion. *See* Dissent at 8 [App. 9c] ("In a former *de jure* system, plaintiffs may establish the prima facie case by proving that there is a current condition of intentional segregation") (emphasis added); *id.* at 35-36 [App. 43c] ("a plaintiff may satisfy his initial burden of proof by relying upon evidence of '*recent* and remote *intentionally* segregative actions' of the school board") (emphasis added); *id.* at 67 [App. 82c] ("This court misses the mark if it is implying that intent is not relevant in this case."); *id.* at 74 [App. 91c] ("intent, whether proven by direct or circumstantial evidence, remains an essential element."); *id.* at 76 [App. 93c] ("It is clear that to sustain the presumption, the plaintiffs were required *to prove* 'a current condition of segregation from *intentional* state action.'") (emphasis added); *id.* at 146-47 [App. 182c] ("The requirement of a current condition of segregation resulting from past or present segregative intent (as opposed to segregation resulting from voluntary demographic change), prior to the operation of the presumption, allows a school system to redeem itself.") *See also Dowell v. Board of Educ.*, ___ F.2d ___, ___ No. 88-1067, dissent at 34 (10th Cir. filed Oct. 6, 1989) (Baldock, J., dissenting) ("To understand the problems with this court's approach, it is necessary to understand how

the burden of proof is allocated before a school district becomes unitary. In a system that was statutorily or officially dual, plaintiffs may establish the prima facie case by *proving* that there is *a current condition of intentional* segregation; that the *de jure* system or its vestiges remain or were reestablished in part of the school system.") (emphasis added).

On the contrary, however, once a school system has been declared unconstitutional because of the existence of *de jure* segregation, "[u]ntil the . . . School System achieves unitary status, official action that has the *effect* of perpetuating or reestablishing a dual school system violates the defendants' duty to desegregate." *Pitts v. Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985) (emphasis in original); *see also*, *e.g.*, *Morgan v. Nucci*, 831 F.2d 313, 329 (1st Cir. 1987) ("[T]he fact that a particular school policy or program may be 'racially neutral,' in that it no longer reflects discriminatory animus, does not prove that the effects of prior discrimination have been purged"). Even the dissent in *Dayton II* recognized that "the affirmative duty renders any discussion of segregative intent after 1954 gratuitous." 443 U.S. at 542-43.

The dissent falls into this error by viewing this case as one of initial liability. The cases the dissent relies on for its statements about plaintiffs' need to prove intentional segregation are all cases describing a plaintiff's duty to establish *de jure* segregation *in*

the first instance. *See*, *e.g.*, *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (dissent at 8, 35-36, 53-54, 68); *Keyes* (dissent at 9, 34-35, 72, 75-76). This is not such a case. As in *Swann*, plaintiffs here are alleging that a school system *which has already been declared unconstitutional* in earlier years has never fulfilled its affirmative duty to eradicate the effects of that segregation. Under these circumstances, plaintiffs need only show that current racial disparities exist, not that such disparities are the result of current *intentional* segregation on the part of the school board. *See Swann*, 402 U.S. at 26. This is not a *liability* case in which plaintiffs must prove that the school board has committed unconstitutional acts; that was established in 1954.

Where a plaintiff has established segregation in the past and the present, it is "entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants."[27]

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[27] The dissent mistakenly refers to this as the "*Keyes* presumption." Dissent at 36, 72-73, 76 [App. 43c, 88-89c, 93c]. The *Keyes* presumption states "that a finding of intentional segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." *Keyes*, 413 U.S. at 208. This is a presumption that is used to establish initial *de jure* segregation in a case where no statutorily mandated segregation exists. The presumption referenced in the instant case

School Board of the City of Richmond v. Baliles, 829 F.2d 1308, 1311 (4th Cir. 1987); *see also Dayton II*, 443 U.S. at 536 (systemwide nature of *de jure* schools in 1954 "furnished prima facie proof that current segregation . . . was caused at least in part by prior intentionally segregative official acts [and] judgment for the plaintiffs was authorized and required absent sufficient countervailing evidence by the defendant school officials."); *Keyes*, 413 U.S. at 211 n.17 (after *de jure* segregation is established, "the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions); *Vaughns v. Board of Educ.*, 758 F.2d 983, 991 (4th Cir. 1985) (same). This presumption ensures that subconscious racial discrimination does not perpetuate the denial of equal

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applied only *after* either statutorily-mandated or policy-based *de jure* segregation has been established. *See id.* at 211 n.17 (*Keyes* court making this distinction); *see also Tasby v. Wright*, 713 F.2d 90, 94 (5th Cir. 1983) (district court relied on wrong presumption). The dissent's misunderstanding of this difference has an obvious and critical impact on its assessment of this record. *See* dissent at 76 [App. 93c] ("It is clear that to sustain the presumption, the plaintiffs were required to prove 'a current condition of segregation from intentional state action'"); *id.* at 145-46 [App. 181c] ("The court simply has jumped the gun in invoking the *Keyes* presumption to arrive at the preliminary and critical conclusion that there is a current condition of segregation in Topeka."); *see also id.* at 146-7 [App. 181-82c] (dire predictions if *Keyes* presumption is required at the outset). The presumption required here is not the *Keyes* presumption but the presumption placed on all school districts previously found liable for operating a *de jure* system.

protection to our nation's school children.[28] A focus on provable intent alone would deny a remedy to too many Americans.

The dissent asserts that under this view of the law, liability in this case would be frozen as of 1954 and "we merely would decree a remedy based upon the failure of the school board to have absolute racial balance at every school and much of this court's opinion . . . would be superfluous." Dissent at 13 [App. 15c]. Of course, liability is not frozen; it just remains until the school board, not the plaintiffs, bears the burden of proving that current racial disparities in the school system are not the result of the prior segregated school system.

Contrary to the district court's apparent conclusion, *see* 671 F. Supp. at 1297, remoteness in time does not make past intentional acts less intentional. *See Dayton II*, 443 U.S. at 535-36; *Keyes v. School Dist. No. 1*, 413 U.S. 189, 210-11 (1973). The passage of time merely presents an opportunity for a school district to show that the presumptive relationship between the *de jure* system and the current system is so attenuated that there is no causal connection. *See id.* at 211.

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[28] As one commentator has observed, "[A]mericans share a historical experience that has resulted in individuals within the culture ubiquitously attaching a significance to race that is irrational and often outside their awareness." Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317, 327 (1987).

What the school district has done to integrate is crucial in determining whether the causal link between he prior segregation and the current disparities has been severed. The district may carry its burden by showing that it has acted affirmatively to desegregate. Absent such proof, the court must presume that current segregation is the result of prior intentional state action. A showing that the school district has not promoted segregation and has allowed desegregation to take place where natural forces worked to that end is insufficient.

The ultimate test of what the school district has done is its effectiveness, most significantly its effectiveness in eliminating the separation of white and minority children.[29] While a district is not always required to choose the most desegregative alternative when it selects a particular option,[30] the result of the sum of the choices made by the district must be to desegregate the system to the maximum possible extent.[31] Furthermore, the school district may "not . . . take any action that would impede the

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29 *See Wright v. Council of City of Emporia*, 407 U.S. 451, 462 (1972); *Davis*, 402 U.S. at 37; *Swann*, 402 U.S. at 25.

30 *See Pitts v. Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985).

31 *See Diaz v. San Jose Unified School Dist.*, 733 F.2d 660 (9th Cir. 1984) (en banc) (castigating school district for consistently choosing more segregative alternatives), *cert. denied*, 471 U.S. 1065 (1985).

process of disestablishing the dual system and its effects." *Dayton II*, 443 U.S. at 538.

One choice frequently made by school districts, and the one made in Topeka, is to use a neighborhood school plan as the basis for student assignment. Neighborhood schools are a deeply rooted and valuable part of American education.[32] To the extent that neighborhoods are themselves segregated, however, such plans tend to prolong the existence of segregation in schools.[33] Thus, they must be carefully scrutinized. They are *not* "*per se* adequate to meet the remedial responsibilities of local boards." *Davis*, 402 U.S. at 37; *see United States v. Board of Educ., Indep. School Dist. No. 1, Tulsa County*, 429 F.2d 1253 (10th Cir. 1970).[34]

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[32] See 20 U.S.C. § 1701 (1982) (declaring it to be the public policy of the United States that neighborhood schools are the appropriate basis for determining public school assignments); *Crawford v. Los Angeles Bd. of Ed.*, 458 U.S. 527, 537 n.15 (1982); *Diaz*, 733 F.2d at 677 (Choy, J., dissenting).

[33] *See* Swann, 402 U.S. at 28; *Diaz*, 733 F.2d at 664.

[34] On remand, the district court in *Tulsa County* developed a plan to desegregate Tulsa's schools, which we subsequently affirmed. 459 F.2d 720 (10th Cir. 1972). The Supreme Court then summarily reversed our affirmance of the proposed plan and remanded for reconsideration in light of *Keyes*. 413 U.S. 916 (1973). We then determined that "the factual premise upon which we based our original decision ha[d] been so materially changed both by lapse of time and the specific and voluntary actions taken by the School Board and the students themselves that our further consideration under the present record would serve no useful

Neighborhood school plans must be both neutrally administered and effective. A plan that is administered in a scrupulously neutral manner but is not effective in producing greater racial balance does not fulfill the affirmative duty to desegregate.[35] It is equally important that a plan's neutrality be more than surface-deep. We have specifically held that when minorities are concentrated in certain areas of the city, neighborhood school plans may be wholly insufficient to fulfill the district's affirmative duty to eliminate the vestiges of segregation. *Tulsa County*, 429 F.2d at 1258-59. Even when neighborhood school plans hold the promise of being effective, courts must recognize that the school district's choices on such questions as where to locate new schools, which schools to close, how to react to overcrowding or underutilization, and what transfer policy to offer, all have obvious impact on the school attendance boundaries the district can draw under a

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purpose." 492 F.2d 1189 (10th Cir. 1974). We remanded to the district court for such further proceedings as might be necessary to bring the school district in conformity with the *Keyes* mandate. Our original decision overturning the district court's finding of no constitutional violation remains the law of this circuit.

[35] *See Morgan*, 831 F.2d at 328-29 (racial neutrality is "unreliable talisman"); *Diaz*, 733 F.2d at 664 (adherence to neighborhood plan not determinative on question of segregative intent); *Adams v. United States*, 620 F.2d 1277, 1285-86 (8th Cir. 1980) (en banc) (adoption of neighborhood school plan did not fulfill duty to desegregate); *cf. Pitts*, 755 F.2d at 1426 (mere adoption of desegregation plan insufficient to render a dual system unitary).

neighborhood school plan.[36] If these choices are not made with an eye toward desegregation, a neighborhood school plan may "further lock the school system into a mold of separation of races." *Swann*, 402 U.S. at 21. Ultimately, whether the use of a neighborhood school plan in a particular case is consistent with a school district's duty to desegregate turns on whether the "school authorities [have made] every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation." *Davis*, 402 U.S. at 33. Contrary to the dissent's suggestion, dissent at 21-22 [App. 25c], a school district which chose a neighborhood school system in 1954 is not insulated from a later contention that neighborhood schools did not result in desegregation.[37] "A school system is not . . . automatically desegregated when a constitutionally acceptable plan is adopted and implemented, for the remnants of discrimination are not readily eradicated." *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218, 225 (5th Cir. 1983).[38]

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[36] *See Columbus Bd. of Educ.*, 443 U.S. 449, 462 & nn. 9-11 (1979); *Swann*, 402 U.S. at 28; *Diaz*, 733 F.2d at 667-71; *Tulsa County*, 429 F.2d at 1256-57.

[37] *See Swann*, 402 U.S. at 21, 28; *Adams*, 620 F.2d at 1286.

[38] *See also Columbus*, 443 U.S. at 459-60 ("In *Swann*, it should be recalled, an initial desegregation plan had been entered in 1965 and had been affirmed on appeal. But the case was reopened, and in 1969 the school board was required to come forth with a more effective plan); *United States v. Lawrence County*

Actions the school district has *not* taken are also relevant in considering what the district has done. A school district which has not made use of such classic segregative techniques as gerrymandering, discriminatory transfer policies, and optional attendance zones is more likely to have fulfilled its duty to desegregate than a district that has done so.[39] Similarly, a school district that has made use of the various techniques available to encourage voluntary desegregation is more likely to have fulfilled its duty than one that has not.[40] Such techniques may include, for example, the establishment of magnet schools and vigorous official encouragement of desegregative transfers.

Finally, objective proof of the school district's intent must be considered. How a district lobbies its patrons and government agencies on issues that affect

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School Dist., 799 F.2d 1031, 1043 (5th Cir. 1986) ("the adoption of the plan does not exhaust the power of the court to direct elimination of vestiges of segregation that remain or become apparent only after the plan has been put into place"); *Pitts*, 755 F.2d at 1426.

[39] *See Adams*, 620 F.2d at 1288-91 (intact busing, school site selection, block busing, transfer policy, and segregated faculty assignments); *Higgins v. Board of Educ.*, 508 F.2d 779, 787 (6th Cir. 1974) (listing segregative techniques); *Tulsa County*, 429 F.2d at 1257 (transfer policy).

[40] *See Ross*, 699 F.2d at 222, 227; *Price*, 694 F.2d at 351-53; *cf. Diaz*, 733 F.2d at 672-73 (criticizing school district for implementing none of desegregation proposals made by citizens' committee).

desegregation, whether it seeks and then heeds the desegregation recommendations of others, and the cooperativeness of the district in complying with court orders, for example, bear on the manner in which the district has shaped the current conditions in the school district.[41]

C. Maximum Practicable Desegregation

What more can and should be done, if anything, is the final component in a determination of unitary status.[42] Essentially, a defendant must demonstrate that it has done everything feasible. Courts must assess the school district's achievements with an eye to the possible and practical, but they must not let longstanding racism blur their ultimate focus on the ideal.[43]

In most unitariness cases, the school district has been implementing a court-approved desegregation

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[41] *See Columbus*, 433 U.S. at 463 n.12 (Board refused to seek advice on desegregation or implement recommendations); *Morgan*, 831 F.2d at 321 (noting cooperation with court orders); *Diaz*, 733 F.2d at 671-74 (manipulation of committee studying segregation; statements suggesting failure of bond issue would lead to forced busing); *Ross*, 699 F.2d at 222-23 (school district appointed community task force to develop magnet plan, opposed efforts to disrupt integration plans, and promoted interdistrict transfer).

[42] *See Davis*, 402 U.S. at 37; *Morgan*, 831 F.2d at 322-25; *Ross*, 699 F.2d at 224-25.

[43] *See Morgan*, 831 F.2d at 324; *Ross*, 699 F.2d at 225.

plan under active court supervision. The question is usually whether closer adherence to the plan is practical or whether the plan has achieved its objectives."[44] The district court in such cases has been intimately involved with the process of desegregation and is well aware of the obstacles it faces. The court can thus make an informed judgment on the possibilities of further desegregation. Where the school district has complied with the desegregation plan to the best of its ability, and has done what can be done in spite of the obstacles in its way, it is reasonable to conclude that no further desegregation is feasible.[45]

The present case is one of those rare ones in which the unitariness determination is not directly tied to the execution of a particular desegregation plan. In such a case, the consideration of whether further desegregation is practicable must include the obstacles that are likely to stand in its way, and whether they may be circumvented without imperiling students' health or the educational process. *See Swann*, 402 U.S. at 30-31. Where there are no significant barriers to desegregation, or such barriers

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[44] *See Morgan*, 831 F.2d at 322-25; *Riddick*, 784 F.2d at 532-34; *Calhoun*, 522 F.2d 717.

[45] *See Ross*, 699 F.2d at 224 (further remedial efforts would be unreasonable and inadequate); *Calhoun v. Cook*, 525 F.2d 1203, 1203 (5th Cir. 1975) (per curiam) ("It would blink reality . . . to hold the Atlanta School System to be nonunitary because further integration is theoretically possible and we expressly decline to do so.").

as exist may be overcome without undue hardship, further desegregation is practicable. *See id.* at 28 (mere awkwardness or inconvenience is no barrier to carrying out desegregation plan).

In sum, when a school system was previously *de jure*, a plaintiff bears the burden of showing that there is a current condition of segregation. It may do so by proving the existence of racially identifiable schools. The school district must then show that such segregation has no causal connection with the prior *de jure* segregation, and that the district has in fact carried out the maximum desegregation practicable for the district. We now apply these legal principles to Topeka.

V.
THE FINDING OF UNITARINESS

Because Topeka's schools formerly operated under a system of *de jure* segregation, "[t]he board's continuing obligation . . . [has been] 'to come forward with a plan that promises realistically to work . . . *now*, . . . until it is clear that state-imposed segregation has been completely removed.'" *Columbus Board of Educ. v. Penick*, 443 U.S. 449, 459 (1979). Prior to this case, no court had pronounced the Topeka school system unitary; hence, this duty never dissipated. The district court concluded, however, that the effects of *de jure*

segregation have been eliminated in Topeka. On appeal, plaintiffs attack this determination.

A. Burden of Proof

Plaintiffs argue initially that the district court improperly required them to prove intentional discriminatory conduct on the part of the school district over the course of the decades instead of according them the benefit of a presumption that current segregation stems from the prior *de jure* system. Plaintiffs quote a number of sentences from the district court's opinion as support for their argument that the court placed on them the burden of proof on intent. Brief for Plaintiffs-Appellants at 27.[46] The court itself expressed some confusion as to the proper burden of proof. 671 F. Supp. at 1295. We have considered both these citations and the tenor of the district court's opinion as a whole, and we are convinced that the court focused too greatly on the school district's lack of discriminatory intent. Although the percentage of minority students in

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[46] For example, the district court stated:

> "Although, on its face, the construction of schools, particularly on the west side of the district, appears to have promoted racial separation, the court does not believe that the district's school construction policy *was intended* to maintain or promote segregation."

671 F. Supp. at 1300 (emphasis added).

Topeka is lower than in other cities involved in desegregation cases and consequently the statistics alone do not appear as egregious, we are persuaded that this overemphasis on the school district's intent led the court to make the same errors as did the district court in *Dayton II*. It failed "to apply the appropriate presumption and burden-shifting principles of law." *Brinkman v. Gilligan*, 583 F.2d 243, 251 (6th Cir. 1978), *aff'd sub nom. Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).[47]

The district court made the following findings: that the neighborhood school attendance boundaries drawn in 1955 had the effect of maintaining segregation; that the construction of new schools since that time had the effect of "promot[ing] racial separation"; that the reassignment of students from previous *de jure* schools to adjacent schools with higher-than-average percentages of minority students had the effect of increasing those percentages; and

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[47] The dissent has fallen into the same error, as we have discussed *supra* at 23-26A & n.27 [App. 24-29b, 27-28b]. The dissent also asserts that we should have remanded to let the district court make appropriate findings in accordance with the presumption and burden-shifting principles we believe apply. Dissent at 4 [App. 5c]. "But fact findings made under an erroneous view of the law or in the absence of a defined legal standard are not binding on appeal." *Oil, Chemical & Atomic Workers v. Amoco Oil Co.*, ___ F.2d ___, ___ No. 86-2838, (10th Cir. filed 9/15/89) (Baldock, J., dissenting and urging reversal of trial court's fact findings on grounds it applied erroneous view of legal standard).

that the assignment of faculty had the effect of placing minority faculty disproportionately at schools with higher-than-average minority student percentages. 671 F. Supp. at 1300, 1301, 1304-05. It is clear from the court's other findings that the school district's use of space additions, its siting of Topeka West high school, its drawing of attendance boundaries, and its failure to adopt various reorganization plans did not further the process of desegregation. *Id.* at 1298-1301, 1308-09. Nevertheless, the court's discussion of most of these aspects of Topeka's history ends with the conclusion that *because these actions were not taken with the intent to discriminate and were consistent with a "race-neutral" neighborhood school plan, they did not promote segregation.*[48] The court evidently believed that if these two criteria, i.e., no intent to discriminate and consistency with a race-neutral neighborhood school plan, were met, the school district's actions would pass constitutional muster. The Supreme Court has made clear, however, that a

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[48] *See, e.g.*, 671 F. Supp. at 1298-99 ("the use of space additions was consistent with a race-neutral neighborhood policy. . . . [I]t has not been shown that space additions were intentionally used to promote segregation. . . ."); *id.* at 1300 ("The court believes the siting of Topeka West High School was a race-neutral decision."); *id.* at 1301 ("The district has consistently applied race-neutral, neighborhood school principles to the demarcation of attendance zones."); *id.* at 1309 ("The court does not believe the district's conduct over thirty years indicates a desire to perpetuate segregation by foregoing opportunities to desegregate schools.").

"race-neutral" neighborhood school policy is not sufficient where it fails to remedy *de jure* segregation:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.
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> " . . . '*Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation* resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation.

> When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. *In short, an assignment plan is not acceptable simply because it appears to be neutral.*"

Swann, 402 U.S. at 28 (emphasis added).[49]

While we agree with the district court's findings that the current school administration is not presently acting with discriminatory intent -- indeed, there is evidence that the present school board has some commitment to desegregation -- we are persuaded that the court failed adequately to weigh the conduct of the school district for the past thirty years, and the

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[49] The dissent recognizes this holding in *Swann*, dissent at 58 [App. 69c], but emphasizes that *Swann* was a *remedial* case. As we have previously pointed out, one of the dissent's major errors is its treatment of this case as if plaintiffs were required to establish an initial case of *de jure* segregation. This *is* a remedy case. The question presented is whether the school board has remedied the *de jure* segregation that existed in 1954. One thing is abundantly clear: Creating neighborhood schools in 1954 *did not* integrate the Topeka schools. *See supra* at 8-9 [App. 9-10b] (Three of the four previously all-black schools remained all-black or virtually so under the new neighborhood school policy.); *see also Adams*, 620 F.2d at 1281 (St. Louis post-*Brown* neighborhood school plan did not change segregated nature of the system. "Those pre-*Brown* white schools located in the black neighborhoods . . . turned virtually all black immediately after the plan was implemented.").

current effects of that conduct. The court erred by limiting the school district's burden merely to showing that it had nondiscriminatory reasons for acting as it did. As thirty years of desegregation law have made clear, the Constitution requires more than ceasing to promote segregation. *See* part IV *supra*. "[T]he measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Dayton II*, 443 U.S. at 538. A lack of intent to discriminate is therefore insufficient. "In short, [a student] assignment plan is not acceptable simply because it appears to be neutral." *Swann*, 402 U.S. at 28. Mere adherence to a race-neutral but ineffective neighborhood school plan is insufficient. In general, any course of action that fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is unacceptable. *Wright v. Council of City of Emporia*, 407 U.S. 451, 460 (1972). The district court did not heed this mandate. While it did find that the school district had taken some actively desegregative actions, we are convinced that the court's overall conclusion as to unitariness was fatally infected by the inadequacy of the burden of proof standard to which it held the school district.

B. The Evidence

In order to assess the district court's finding of unitariness under the appropriate burden of proof and the general principles we have outlined, we turn to a more specific review of the record. As a general matter, it is important to note that much of the record evidence consists of statistics and other undisputed facts.[50] Our differences with the district court lie mainly in how the essentially undisputed facts are assessed in light of the school district's mandate to dismantle the segregated school system. We believe that the district court's finding of unitariness is flawed by the undue deference it gave to the school district's neighborhood school policy and by the court's failure to give proper weight to its own findings that certain actions and omissions by the school district had a segregative effect.[51] *Cf. Diaz*

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[50] The dissent argues that it is the district court's job, not ours, to decide which party's experts are more believable. We, of course, agree. In reaching our conclusion that the district court was clearly erroneous in its determination that the Topeka school system has become unitary, we did not rely on the experts' opinions but rather on the undisputed statistics about the racial makeup of the various schools and their faculty/staffs, and the basically uncontroverted evidence about what the school board did, or failed to do, to meet its affirmative duty to dismantle the segregated system.

[51] We are similarly convinced that the dissent's review of the record is colored by its erroneous understanding of the burdens of proof and the role of intent. *See supra* at 23-26A & n.27 [App. 24-29b & 27-28b n.27].

v. San Jose Unified School Dist., 733 F.2d 660, 674 (9th Cir. 1984) (en banc) ("In making its determination in respect to the Board's intent, the district court erred in failing to give weight to the cumulative impact of the evidence"; district court's findings that defendants acted without segregative intent held clearly erroneous).

1. Current Condition of Segregation in Topeka

The district court found that "there are disparities in the racial makeup of various schools' enrollments," and that "[p]laintiffs have demonstrated that in general there are a greater than average number of minority faculty and staff in schools with a greater than average number of minority students." 671 F. Supp. at 1295, 1304. Like most courts, however, the district court did not discuss separately the issues of current segregation and the causal connection between that segregation and the prior de jure segregation.

As we have pointed out, the simplest and most compelling evidence of segregation is the presence of predominantly one-race schools. In a system such as Topeka's, however, in which the minority student population is relatively small, there may be a number of primarily white schools even though minority students are spread through a significant number of other schools. In such a system, it is the concentration of minority students that is usually the

hallmark of discrimination.[52] Because the significance of mostly white schools is therefore not necessarily as great in a mostly white system as it would be in a system with a heavy minority population, we focus on the broader form of racial identifiability discussed in part IV A above. In support of their argument that there is currently segregation in Topeka, plaintiffs point primarily to student assignment, and faculty and staff assignment.[53] We consider each in turn, and then together.

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[52] The dissent is favorably impressed that only three of 34 Topeka schools currently have majority-minority populations. Dissent at 143 [App. 177c]. The dissent is similarly impressed that of the eight schools that plaintiffs identified at trial as racially identifiable minority, white students make up 49.3% of the total student population at these schools. Dissent at 110 [App. 136c]. We are not so favorably impressed. In a school system with a 26% minority student population, we think the number of schools in Topeka that approach or are over the 50% minority mark constitute persuasive evidence that the school system has not met its duty to disegregate.

[53] Plaintiffs do not contest the district court's finding that the Topeka school system is unitary with respect to facilities, extracurricular activities, curriculum, transportation, and equality of education. *See Brown*, 671 F. Supp. at 1307-08. There are currently no optional attendance zones, and the district's transfer policy is a majority-to-minority program. *See id.* at 1298.

a. Student Assignment

Each of the experts who testified at trial used a different standard for determining whether a school was racially identifiable in student assignment. Plaintiffs' main experts, Mr. Lamson and Dr. Foster, each used standards that took the percentage of black or minority students actually enrolled in the elementary or secondary schools (26% in 1985), and then added and subtracted some number to obtain a range within which they did not consider schools to be racially identifiable on the basis of student assignment alone. Their methods differ to some extent, but for 1985 either method leads to a range

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Plaintiffs commissioned a public opinion survey in order to determine whether Topekans perceive some schools as black/minority and others as white, whether they perceive some schools as providing an inferior education, and whether there is a correspondence between the two. While the results of the survey provide some support for plaintiffs' contentions, the survey was extensively criticized as unreliable by several of the school district's experts. The district court discussed additional flaws and concluded that the survey was not strong evidence of the existence of segregation. 671 F. Supp. at 1305-06. We see no error in that conclusion. We therefore disregard the survey results.

of 11-41% (26% plus or minus 15%).[54] The school district's primary expert on this issue, Dr. Armor, used an absolute rather than a relative standard. In his view, desegregated schools should optimally have 20-50% minority students, regardless of the percentage of minority students in the system. Dr. Armor also allowed a variance, which resulted in a range of acceptability of 10-60%.[55]

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[54] The dissent attacks the use of a ±15% deviation from the district average of minority students to assess the racial identifiability of the schools, while at the same time conceding that "[t]he trial judge seems to have analyzed the plaintiffs' case in part with a ±15% standard," dissent at 78 [App. 95c]. In *Swann*, the Court accepted the district-wide average of 71% white/29% black, *with no deviation*, as an acceptable starting point for the district court in shaping a remedy. 402 U.S. at 24-25. Where, as here, the school district has been held liable for imposing an unconstitutional segregated school system, we believe it perfectly reasonable to use a ±15% deviation in assessing whether the school system ever achieved unitariness.

[55] The school district also offered two indices as a measure of desegregation in Topeka's schools. Rec., vol. XIII, at 2574-80. The dissimilarity index measures how dissimilar schools are compared to the district's mean. Rec., vol. IV, at 558. The exposure index is a measure of the potential for interracial contact. The indices are measures of system-wide desegregation, however; they say nothing about the racial balance in individual schools. Rec., vol. IV, at 554-57; rec., vol. XIII, at 2581. The dissent places great reliance on these indices, pointing out that they have shown significant improvement since 1954. Dissent at 83-85 [App. 102-104c]. Defendants' expert Dr. Armour agreed, however, that the indices are only summary measures.

As plaintiffs point out, under any of these methods there are schools in Topeka that are racially identifiable by student assignment. Even under the most generous of these numerical standards, proposed by the school board's expert, there are six elementary and three secondary schools that are racially identifiable by student assignment.

Notwithstanding the dissent's view that the statistics regarding the percentages of minorities in the racially overbalanced schools do not add up to a current condition of segregation, we believe the figures speak for themselves. *See supra* at 8-14 [App. 9-15b]. In this connection, the charts in the dissent showing the racial inventories over the years at Belvoir, Hudson, Highland Park North, Lafayette, Quinton Heights, and Lowman Hill speak more eloquently about the current condition of segregation in Topeka than words ever could. *See* dissent at 111 n. 43; 114 n. 44; 116 n. 45; 117-18 n.46; 121-22 n.47; 132-33 n.51 [App. 137-38c n.43, 141c n.44, 144c n.45, 146-47c n.46, 151-52c n.47, 164-65c n.51].

b. Faculty and Staff Assignment

To determine racial identifiability by faculty/staff assignment, plaintiffs again used a standard based on

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rec., vol. XIII, at 2623-24, and conceded that it is possible to have a school system with a good exposure index that nonetheless contains an all-black school, *id.* at 2653-54. Therefore, even if a *school system* has relatively good rates on these indices, it is still necessary to look at the racial statistics at individual schools to get a true picture.

the actual percentage of minority employees and a range of a few percentage points above and below that number. The school district contested the accuracy of plaintiffs' standard but presented no alternative one. We do not adopt plaintiffs' standard, but instead evaluate the data on its face.[56]

In 1985, the percentage of minority faculty/staff in the Topeka school system was 11.2% for the elementary schools and 12.65% for the secondary schools. In the elementary schools, the percentage of minority faculty/staff at individual schools ranged from 0% to 33.3%. Nine schools had less than 5% minority faculty/staff, and two had more than 25%.[57] In the secondary schools, the percentage

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56 The range used by plaintiffs was very narrow, and it was extremely difficult for any school to fall within it. In 1985, for example, only four of the twenty-six elementary schools were *not* racially identifiable under plaintiffs' standard. While it is appropriate to use a harsher standard for analyzing faculty assignments than student assignments, since the school district may assign faculty as it sees fit, plaintiffs' standard is simply too difficult to meet in this case. We note, moreover, that the school district is limited to some extent in its ability to assign faculty because different teachers are certified in different fields. This is particularly true at the secondary level.

57

Minority Faculty/Staff In
Topeka's Elementary Schools, 1985-86

School	Total	Minority	%
Avondale East	31.4	10.45	33.3
Avondale West	25.8	1.0	3.9
Belvoir	25.95	3.85	14.8
Bishop	23.8	.4	1.7
Crestview	31.65	3.4	10.7

ranged from 2.5% to 24.7%. One school had less than 5% minority faculty/staff, an additional three

Gage	21.0	1.0	4.8
Highland Park Central	34.6	3.9	11.3
Highland Park North	28.6	5.5	19.2
Highland Park South	29.2	5.4	18.5
Hudson	19.75	3.8	19.2
Lafayette	32.6	5.65	17.3
Linn	17.8	.3	1.7
Lowman Hill	25.6	6.5	25.4
Lundgren	21.55	2.8	13.0
McCarter	27.4	3.0	10.9
McClure	25.1	0.0	0.0
McEachron	23.5	1.0	4.3
Potwin	14.15	2.0	14.1
Quincy	32.35	1.0	3.1
Quinton Heights	20.4	4.4	21.6
Randolph	27.0	1.0	3.7
Shaner	21.9	2.0	9.1
State Street	22.9	1.3	5.7
Stout	20.6	2.0	9.7
Sumner	23.3	1.85	7.9
Whitson	35.35	1.0	2.8

Average minority faculty/staff: 11.2%

Rec., ex. vol. IV, at 261.

schools had less than 10%, and one had more than 20%.[58]

Faculty/staff data have been kept only since 1973 and, except for 1981, that data does not distinguish between faculty and staff. Rec., ex. vol. IV, at 263-68. Faculty/staff includes managerial personnel at both the school and district level, teacher aides, clerical/secretarial employees, skilled and technical employees, and service workers, as well as teachers and other professional staff. The distinction between faculty and staff is particularly relevant because the percentage of minority employees has always been lower than the minority student population, and has fallen steadily at the elementary level over the period such data was kept.

58

Minority Faculty/Staff In
Topeka's Secondary Schools, 1985-86

School	Total	Minority	%
Chase	40.5	7.45	18.4
Eisenhower	65.25	12.1	18.5
French	42.6	2.4	5.6
Jardine	39.65	3.8	9.6
Landon	31.1	3.0	9.6
Robinson	49.35	12.2	24.7
Highland Park	118.25	13.65	11.5
Topeka	150.1	25.5	17.0
Topeka West	120.0	3.0	2.5

Average minority faculty/staff: 12.65%.

Rec., ex. vol. IV, at 262.

Moreover, minorities are represented more heavily in staff positions than in faculty positions. In 1985, for example, district-wide statistics showed that 11.3% of elementary teachers and 8.0% of secondary teachers were minorities, while 19% of teacher aides and 20% of service workers were minorities. Rec., vol. IV, at 268. Any one faculty/ staff person listed at any one school is thus more likely to be a teacher aide or service worker than a teacher.

We recognize that the small number of faculty and staff at any one school means that the presence or absence of one minority employee may have a considerable effect on the school's minority percentage. Nevertheless, we see no obviously neutral reason why McClure elementary school has no minority employees among its 25 faculty/staff and Topeka West high school has 3 among 120, while Avondale East elementary school has 10 minority faculty/staff out of a total of 31 employees and Robinson middle school has 12 out of 49.

c. Factors considered together

Because faculty/staff assignment is largely within the control of the school district, it is a potent tool for demonstrating that the district does or does not itself identify certain schools as white or minority. It also provides an opportunity for undoing some of the harm of segregated student assignments, because both white and minority students may benefit from the presence of minority role models. *See*

Washington v. Seattle School District, No. 1, 458 U.S. 457, 472 (1982) ("white as well as Negro children benefit from exposure to ethnic and racial diversity in the classroom"). Conversely, if the district disproportionately assigns minority faculty/staff to those schools with the highest percentages of minority students, the district is in effect reinforcing the identification of particular schools as white or minority. This practice of disproportionate assignments also reinforces the irrational notion that minority teachers are inferior and not fit to teach white children.

In Topeka, although the correlation is not completely uniform, *see* 671 F. Supp. at 1305, there is a clear pattern of assigning minority faculty/staff in a manner that reflects minority student assignment. This correlation is fatal to the school district's effort to show a lack of current segregation. Both student assignment and faculty/staff assignment can be expected to vary from school to school, the former because of population distribution, and the latter, to a lesser extent, because of differing teacher credentials. When they vary together, as they do in Topeka, leading to schools that are noticeably more white or more minority in both students and faculty,

it is difficult to posit a neutral explanation.[59] The

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[59] The racially identifiable schools in 1985-86 under the ±15% standard were as follows:

1985-86

Elementary Schools (26)	Min	W	Total	% Min	
Belvoir	146	90	236	61.9	
Highland Park North	179	130	309	57.9	
Lafayette	217	165	382	56.8	
Quinton Heights	129	132	261	49.4	
Hudson	108	124	232	46.6	7 schools
Avondale East	128	162	290	44.1	ident.
Lowman Hill	155	215	370	41.9	minority by enroll-ment
Bishop	36	306	342	10.5	
McEachron	30	261	291	10.3	
Whitson	38	334	372	10.2	
Gage	25	240	265	9.4	
McCarter	35	347	382	9.2	8 schools
Crestview	32	326	358	8.9	ident.
Potwin	18	215	233	7.7	white by
McClure	23	296	319	7.2	enroll-ment

Rec., ex. supp. vol. 13, pl. ex. 155 D

school district has not attempted to provide one.

Moreover, when we look beyond the numbers, we find that the schools that are marked as white or minority by their students and faculty/staff are also so marked by their geography, the residential population in their attendance areas, and by their history. Of the six racially identifiable elementary schools detected by Dr. Armor's method, five are now and always have been attended almost exclusively by

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1985-86

Secondary Schools (9)	Min	W	Total	% Min	
Eisenhower	218	230	448	48.7	1 school ident. minority by enrollment
Landon	25	205	226	9.3	3 schools ident. white by enrollment
Topeka West High School	120	1391	1511	7.9	
French	16	241	257	6.2	

Id. pl. ex. 155 G.

When the schools in these tables are looked at in notes 59 and 60 supra, one sees that all but one of the racially identifiable minority elementary and junior high schools have minority faculty/staff percentages ranging from 17.3% to 33.3%. Six of the schools identified as racially identifiable white have minority faculty/staff percentages ranging from 0.0% to 5.6%.

white students. They are located on the western and northwestern edges of the school district, areas with mostly white populations.[60] The same is true of the three secondary schools. *See infra* part V B(2)(c)(vii). The one remaining elementary school, Belvoir, is located on the eastern edge of the school district. The area has long been inhabited by a significant minority population, and the school's student population is now and has been for over twenty years more than half minority. *See infra* part V B(2)(c)(i). Finally, the correlation between student assignment and faculty/staff assignment is not a one-year fluke. The same correlation has existed throughout the course of this litigation. *See infra* part V B(2)(b)(ii). Considering all of these factors together, there is sufficient evidence to support plaintiffs' contention that there is a current condition of segregation in Topeka.[61]

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[60] For two of these schools, Gage and Potwin, the district court specifically found that they have been predominantly white schools since the Supreme Court's decision in this case, and remain predominantly white schools adjacent to schools with higher-than-average minority student population. 671 F. Supp. at 1303.

[61] We do not consider this part of our opinion necessarily in conflict with the district court's conclusion that there is no illegal segregation in Topeka, because the court did not separately consider the issue of current segregation apart from the question of causation. As we previously pointed out, the district court did find the existence of racial disparities in school enrollment and staff/faculty assignment. *See supra* at 36, 41 [App. 39-40b, 45b]. Our disagreement with the district court is chiefly on the significance of these findings in a school district with Topeka's history, and bearing the weight of a presumption against it which the district court failed to accord.

2. The Causal Link Between *De jure* Segregation and the Current Condition of Segregation

Brown I established that the Topeka school system was one of *de jure* segregation. Because there is a current condition of segregation, we turn our attention to the causal link between these two conditions of segregation, which must be assessed in light of the burden and factors set out in part IV B, *supra*. We are convinced that the school district failed to meet its burden of showing the absence of this link. This failure, which the district court did not see because it failed to impose on defendants the proper burden of proof, is the key to our reversal.

Timing is central to an assessment of the Topeka school district's actions. After what was described as a "good faith" beginning, *Brown*, 139 F.Supp. at 470, the course the school district followed in the late 1950s and early 1960s may fairly be characterized as segregative. The decade from 1956 to 1966 is important because it established a framework from which the school district subsequently deviated very little.[62] A period of quiescence then followed, during which the system

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62 Thus, one of the school district's experts, after reluctantly admitting that Lowman Hill elementary school's attendance boundaries were drawn in the 1950s with the effect of encompassing the only two areas of black population in that part of Topeka, and that the school was long surrounded by other schools with few to no black students, objected that "the boundaries of those school districts [were] in place." Rec., vol. XI, at 2345.

was simply administered as it stood. It was not until HEW threatened to withhold federal funds in the mid-1970s that the school district undertook some positive action to desegregate its schools. After that brief flurry of action, the school district again turned its attention elsewhere, but to its good fortune the oft-maligned forces of demography began to work in its favor. Two things are apparent from the record. First, Topeka has largely acted as if it had fulfilled its duty to desegregate at the conclusion of the four-step plan implemented in the 1950s. Second, although Topeka's schools have in fact become less segregated in the last decade, this lessening of segregation is due in part to forces beyond the control of the school district. Moreover, those desegregative actions which the school board did undertake were primarily the result of pressure from the federal government, or were instituted after this lawsuit was filed.[63] Although its record is better than that of many other school districts, Topeka has engaged in voluntary desegregation with little enthusiasm.

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63 *See Dayton II*, 443 U.S. at 540 n. 11 ("[F]aculty segregation disappeared completely only after efforts of the Department of Health, Education, and Welfare."); *Columbus*, 443 U.S. at 461 & n.8 (practices of assigning black teachers to schools with substantial black populations and creating optional attendance zones to permit white students to avoid predominantly black schools ceased respectively only after Ohio Civil Rights Commission complaint and the instant lawsuit); *Tasby*, 713 F.2d at 93 ("'[T]he District has never voluntarily moved to desegregate the Dallas school system; every step toward desegregation has been due to court action.'").

a. The general pattern in each decade

i. The mid-50s to mid-60s

This period was one of significant change in the Topeka school district. Most notably, the district expanded greatly with several city-imposed annexations at the end of the 1950s, the beginning of a spurt in population growth and shift to the newly annexed areas, and the school district's consequent opening of new schools in this outer white part of Topeka. As the white population moved outwards, the inner city population became increasingly heavily minority, and inner city schools were closed.

The mid-60s found the Topeka school system still heavily segregated. While the numeric polarization between schools had decreased to some extent systemwide,[64] and minority students were somewhat less concentrated,[65] the number of schools

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[64] In 1955, 3 elementary schools were 99+% black and 14 elementary schools were 90+% white for a total of 17 out of the 23 elementary schools. In 1966, 1 elementary school was 90+% minority and 19 elementary schools were 90+% white, for a total of 20 out of the 35 elementary schools. Rec., ex. vol IV, at 39-40, 54-56. Pages 30-181 of volume IV of the exhibits consist of student enrollments for individual schools from 1950 to 1985. We henceforth refer to this part of the record as Student Tables.

[65] In 1955, about half of Topeka's black students attended three schools that were 99+% black. In 1966, approximately the same percentage of minority students attended one 90+% minority school and three 50-80% minority schools. Student Tables, 1955, 1966.

serving primarily white children had increased. Geographic polarization also increased, as a result of the building of so many primarily white schools on the outer edges of the district. Plaintiffs introduced evidence tending to show that the school district's use of portable classrooms and optional attendance zones served to maintain segregation by concentrating students of one race at certain schools. The school district's expert, Dr. Clark, conceded that his study of changes in attendance zone population because of changed attendance boundaries led him to conclude that one such boundary change might have had segregative effects not explainable solely by demographic shifts.[66]

We have no doubt that during this period the school district in fact maintained and perhaps promoted a segregated system by current standards. Moreover, the system that existed after the waive of school openings and closings ended, i.e., the location of schools and the race of their students, formed the basis for the current elementary system. Therefore, while the school district should not be judged primarily by actions now twenty or more years in the past, neither can those actions be ignored.

ii. Mid-60s to Mid-70s

This period was one of quiescence in the school district. Enrollment in the Topeka school system

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66 Rec., vol. XI, at 2326.

peaked in 1969, substantially ending the need for new school buildings. Outer Topeka continued to grow in white population, particularly in the western part of the city. Minority population began to spread out of its highly concentrated central areas into eastern Topeka.

The only significant change in the school system at the end of this period was that the number of virtually all-white schools dropped. At the elementary level, 19 out of a total of 35 elementary schools were virtually one-race in 1966; 13 out of a total of 34 were virtually one-race in 1974.[67] The change at the secondary level was even less: from 6 out of 14 schools in 1966, to 5 out of 15 schools in 1974. This change took place primarily in schools on the outskirts of the southeastern part of Topeka, the area into which minorities were spreading. The school district's conduct during this period can thus be summarized as letting demographic forces work without interference or encouragement. This also means that schools already heavily minority were allowed to increase in minority population.[68] It is

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[67] Student Tables, 1966, 1974. Lyman elementary school was deannexed during this period.

[68] In 1966, Belvoir elementary school had 59.7% minority students and Lafayette elementary school had 54.5% minority students. By 1974, Belvoir had 67.1% minority students and Lafayette had 68.9%. At the secondary level, Crane junior high rose from 34.45% minority in 1966 to 52.9% in 1974, while East Topeka junior high remained more than 60% minority. Student Tables, 1966, 1974.

apparent that while Topeka did not promote a segregated school system during this period, it maintained the system then in effect notwithstanding its affirmative duty to eliminate segregated schools.

iii. Mid-70s to the present

In 1974, the HEW compliance action began the third phase of the Topeka school system since *Brown I*. At the elementary level, HEW cited unequal facilities for minority and white children as well as "student racial compositions not consonant with a unitary plan." Five elementary schools were specifically listed as having "substantially disproportionate minority student compositions clearly the result of a former dual pattern of operation." At the secondary level, HEW found that the junior high schools attended by most minority students were inferior in facilities to those schools attended largely by white students. In addition, the district's transfer plan was criticized.[69] The Board denied that the district was in noncompliance and obtained an injunction against further HEW administrative proceedings. Nevertheless, the Board agreed to take "administrative steps to assure a more

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69 Rec., vol. V, at 12-14.

perfect unitary school district."[70] It developed and implemented two plans largely approved by HEW.

These plans had some success. At the end of the reorganization, there were no 90+% minority elementary schools, the attendance boundaries of two 90+% white schools had been redrawn so that they were no longer one-race, and a third one-race white school had been closed. At the secondary level, two heavily minority and one primarily white junior high school had been closed, although the minority population of one other junior high school had risen significantly as a result of the reorganization. The school district's desegregation indices for elementary schools dropped significantly between 1975 and 1981.[71]

Some of this decline, however, was the result of the movement of minorities into the western part of the school district. During the same six-year period, three additional elementary schools rose above the 10% minority level solely because of this

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[70] Rec., vol. XII, at 2485-91; rec., ex. vol. V, at 245-47.

[71] Topeka's dissimilarity index for elementary schools dropped from 62.1 in 1955 to 51.6 in 1975, a drop of approximately 10 points. In 1981 the index stood at 40.8. Topeka's relative exposure index for elementary schools fell from 47.7 in 1955 to 27.1 in 1975, and further to 17.2 in 1981. These drops indicate that the school system as a whole was becoming less segregated. Rec., ex. vol. II, at 156-57.

demographic change.[72] This movement has continued. In 1985, two additional elementary schools were just barely no longer one-race for that reason.[73]

The defendants' experts, Dr. Clark, *see, e.g.*, rec., vol. XI, at 2338-39, and Dr. Armour, *see, e.g.*, rec., vol. XIII, at 2579, the district court, *see* 671 F.Supp. at 1302-03, 1310, and the dissent, *see, e.g.*, dissent at 112, 114-15, 117, 120 [App. 138-39c, 142c, 145c, 150c], all mistakenly believe that the changing demographics which resulted in unfavorable racial balances at various schools excuses the school board from achieving more acceptable racial balances. This view is clearly wrong where, as here, the school system is under an affirmative duty to dismantle a dual school system. "Until a unitary system is created, a school system is not absolved from this duty by reason of demographic changes." *Vaughns v. Board of Educ.*, 758 F.2d at 988; *see also, Lee v. Macon County Bd. of Educ.*, 616 F.2d 805, 809-10 (5th Cir. 1980); *cf. Tasby v. Wright*, 713 F.2d at 91 n. 3, 93 (school districts' white population was 58.2% when lawsuit filed in 1970 and dropped to 29.53% by 1981; school district not yet unitary). It is *only*

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[72] Student Tables, 1975, 1981; *compare* rec., ex. vol. I, at 48-B (1974 map) *with id.* at 49-A (1979 map; no change to Bishop, Avondale West, or Lundgren).

[73] Student Tables, 1985 (McEachron and Whitson).

> "[w]hen state officials have not only made good-faith efforts to eliminate the vestiges of segregation, but have actually achieved a school system clean of every residue of past official discrimination, [that] immutable geographic factors and post-desegregation demographic changes that prevent the homogenation of all student bodies do not bar judicial recognition that the school system is unitary."

Ross v. Houston Indep. Sch. Dist., 699 F.2d at 225. The school district's excuse for the racial imbalance which exists today in Topeka's schools is that shifting residential patterns caused the problem. That is an unacceptable excuse when the school district has never fully dismantled the effects of the prior *de jure* segregation.

Other changes that took place in Topeka from the mid-70s to the date of trial are as follows: elections to the Board were changed in 1976 to ensure that all parts of the city were fairly represented; the Board has now, and has had for some time, significant minority representation; in 1981, the district abandoned a slightly segregative majority-to-minority transfer policy for a transfer policy that is slightly desegregative; in 1984, while this trial was pending, a black superintendent was appointed; and, five days before the beginning of trial, the district adopted an explicit policy against

discrimination in faculty and staff assignment.[74] These changes are deliberate and voluntary actions on the part of the school district, and constitute evidence that the district is, as it claims, now committed to desegregation.[75]

There is no doubt that the Topeka school system has improved dramatically in the last ten years as far as desegregation is concerned. However, the system was equally undoubtedly in need of such improvement. The question now is whether these changes broke the causal link between the system that existed prior to them and the current system. Based on our review of the record, we have a definite and firm conviction that they did not. Approximately one quarter of Topeka's minority elementary students still attend three schools more than 50% minority, two of which have fallen into this category since at least 1966. One-race white schools have existed throughout the relevant period; many remain, and those that are no longer within the

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74 Rec., vol. XII, at 2473-75.

75 Plaintiffs point to the school board's refusal to adopt two desegregative reorganization plans proposed in 1984 by the Topeka school administration as evidence that the district is not presently committed to desegregation. These plans were violently opposed by minorities and whites alike because they would have destroyed the neighborhood school system, and we do not believe that the failure to adopt them reflects a current lack of commitment to desegregation. Nevertheless, the proposal of plans described as completely unworkable by a then-member of the Board does not satisfy the district's duty to desegregate its schools.

90+% white range are still heavily white schools. Most of the reorganization took place in the center of the school district; the schools on the periphery -- the ones most clearly marked as minority or white schools -- were largely unaffected. The distribution of faculty/staff has improved, but in 1985 there was still one school with no minority faculty/staff and eight schools with only one full- or part-time minority faculty/staff person, who may or may not be a teacher or other professional, and these schools are those same schools that have lacked minority faculty/staff since the 1960s. This is a system improved, but it is still the same system.

b. Individual Factors

Green v. County School Board, 391 U.S. 430, 435 (1968), identified faculty, staff transportation, extracurricular affairs, and facilities as facets of school operations that must be considered in determining racial identifiability of schools. *Swann* added student attendance, school siting, opening and closing, and the drawing of attendance boundaries as factors to be weighed. *Swann*, 402 U.S. at 25-29. The district court made detailed findings as to most of these. We discuss below those factors that most clearly demonstrate the continuing causal link between past and present segregation.

i. Student assignment over time

We begin by considering the subsequent history of the schools in existence at the time of *Brown II*. No real pattern emerges. Seventeen elementary schools have more or less maintained the same racial identity for the last twenty years, while nine have changed. For the most part, the major shifts in student attendance mandated by the school district have had relatively little effect, although there has been some improvement in the last ten years.[76] Nevertheless, the record convinces us that the causal connection between the Topeka school system in 1955 and the same system in 1985 has not been broken. The school district has unquestionably had the opportunity to draw up and execute a scheme designed to lead to comprehensive desegregation. Moreover, Topeka does not have the kind of

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[76] Two elementary schools with more than 80% minority students were closed (Monroe 1975, Parkdale 1978) and the target minority percentages approved by HEW in 1976 have either been met or improved on. *Compare* rec., ex. vol. V, at 37 (projected enrollments of elementary schools under plan designed to satisfy HEW) *with* Student Tables, 1985. It should be noted that HEW did not approve the projected enrollments of more than 70% minority for Lafayette and Belvoir under the plan cited above. Rec., ex. vol. II, at 173. In the last five years, minority enrollments have increased in the primarily white schools, bringing them towards or over 10% minority, while the percentage of minority students at disproportionately minority schools has remained steady or dropped slightly. Student Tables, 1980-1985. The difference between schools that are more heavily minority and those that are primarily white have thus been narrowing.

geographical barriers that have sometimes frustrated desegration plans.[77] Its minority population is spread over half the city, not concentrated in hard-to-reach enclaves.[78] It has altered the attendance boundaries of almost every school and closed many of them; it has in place a slightly desegregative transfer plan that potentially could be significant; and it has apparently faced little or no racially-motivated opposition from the community.[79] *Nonetheless, there is, we repeat, no pattern to the changes over the years. There should have been one.* We simply see no evidence that Topeka dedicated itself to desegregation prior to the reopening of this case.[80] Although former members of the Board testified that they did not vote for plans with segregative effects, they did not testify that they regularly took

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77 *Cf. Stout v. Jefferson County Bd. of Educ.*, 537 F.2d 800 (5th Cir. 1976) (mountain range and dangerous roads).

78 *Cf. Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987) (racially identifiable schools in heavily black areas or cut off by harbor); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 224 (5th Cir. 1983) (segregated schools located at opposite ends of large urban school district).

79 We do not mean to suggest that the school district has not faced opposition on other grounds. Both the reorganization of the late 1970s and two plans proposed in 1984 for further reorganization were met by community resistance. Rec., vol. XIII, at 2437-38.

80 *Cf. Tasby v. Wright*, 713 F.2d 90, 93 (5th Cir. 1983); *Ross*, 699 F.2d at 222.

desegregation concerns into account.[81] The reaction of at least one Board member to the white flight of the 1950s and 1960s was "What could we do? We can't make people not move, no way."[82] After hearing the testimony of the Board members, the district court commented, "I am not interested in just any intentional acts that would hinder integration. I am also wondering if there is any action taken by this school board and past school boards to promote that integration, rather than hinder. . . . [A]re we going to get to this . . .?" Rec., vol. XII, at 2534. This perceptive question focused on precisely what is missing from the school district's evidence. By no stretch of imagination can the school district's conduct be characterized as acting "with all deliberate speed" to "convert to a unitary system in which racial discrimination would be eliminated root and branch."[83]

We do not ignore the changes made to the school system in the late 1970s. In our view, however, the effect of these changes was to make a

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81 Rec., vol. XII, at 2418 (Board member 1957-1965: no discussions on segregative or desegregative effects of actions); rec., vol. XII, at 2440-41 (Board member 1977-1985: Board voted for open enrollment plan although warned it might have segregative effect); rec., vol. XII, at 2491 (Board member 1973-1977: Board resisted HEW efforts because it considered system unitary then).

82 Rec., vol. XII, at 2423.

83 *Brown II*, 349 U.S. at 301; *Green*, 391 U.S. at 437-38.

system that was highly segregated as to student assignment into a system that is still segregated, although somewhat less so.

ii. Faculty/staff assignment over time

Plaintiffs do not dispute the district court's finding that the *hiring* of minority faculty and staff is not now discriminatory. 671 F. Supp. at 1304. They do challenge the court's conclusion with respect to the *assignment* of faculty and staff. They point out that the court in fact found that the assignment of faculty/staff is disproportionate, and they argue that this disproportion, and its consistency over time, is "one of the classic indices of a segregated school system." Brief for Plaintiffs-Appellants at 38. They criticize the district court for having unduly minimized the import of this evidence of segregation.

For example, while it is true that all of the district's schools have been within 10% of the average percentage minority faculty/staff at least once in the last ten years, 671 F. Supp. at 1305, that statement is misleading considering that the percentage of minority faculty/staff in the system as a whole has ranged only from 9.9% to 16% in the last ten years at the elementary level and is currently about 11%. Thus, in 1975, when the average percentage was 9.9%, schools with no minority faculty or staff were still technically within 10% of the average. The 10% once-in-ten-years standard includes both McEachron, which had no minority

faculty/staff for nine of the 13 years for which such statistics have been kept and in the last three years has had only one minority faculty/staff member out of approximately 25, and Lowman Hill, which has never had less than 15% and has once had more than 30% minority faculty/staff during the same time period. Furthermore, while it is true, as the district court noted, that the percentage of minority faculty/staff assignment has not invariably tracked the percentage of minority students, there is nevertheless a distinct pattern of correlation. McClure, for example, which has had more than 5% minority students only in 1979 and 1985, has had no minority faculty/staff since 1979, while Avondale East, which has generally had minority student percentages in the 30s and 40s has also generally had minority faculty/staff percentages in the 20s and 30s. Finally, because our data does not distinguish between faculty and staff, and because minority employees are more heavily represented as staff than as faculty, it is quite possible that the one minority faculty/staff person at McEachron, for instance, is a janitorial staff person or other service worker rather than a teacher or other professional role model.

The long-standing pattern of imbalances coupled with the tracking of student assignment percentages is strong evidence of a dual system because, as pointed out above, faculty/staff assignment is far less difficult to adjust than a factor such as student assignment. While the ratio of minority faculty/staff in schools with different levels of minority students

has improved over the twelve years that records have been kept, that improvement alone does not alter the pattern. It merely makes it less dramatic.

There is one area in which the Topeka school system is clearly desegregated. Minorities are well-represented, indeed statistically over-represented, at the managerial level. Several principals are minorities, as is the current superintendent. This is both laudable in itself and an indication that whatever bias lingers in the assignment of faculty/staff is not deliberate. Nevertheless, although there has been improvement in this area, racial disparity does in fact linger because the school district has not consciously addressed the problem.[84] Inertia has thus led to the maintenance, albeit in less striking form, of a system that has kept white faculty at primarily white schools and minority faculty at predominantly minority schools.

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[84] According to Dr. Foster, the school district administrator in charge of personnel for 1984 stated in a deposition that he had "no knowledge of an assignment policy regarding assignment of minority personnel." Rec., vol. V, at 632. The school district does not deny that there was no policy directed expressly at assignment. Instead, it claims that its 1963 policy against discrimination in recruitment was broad enough to cover assignment. Rec., vol. X, at 1517; rec., vol. XII, at 2428-29; rec., vol. XII, at 2692-99; rec., ex. vol. II, at 58-59; rec., ex. vol. IV, at 217-19.

iii. Attendance boundaries and how (not) changed

Attendance boundaries determine the neighborhoods from which neighborhood schools draw their students. They can be used as an important tool in either imposing or undoing segregation under an ostensibly race-neutral neighborhood school policy. We do not disagree with the district court's finding that attendance boundaries have not been drawn in recent years with racial animus. In the past, however, the school district drew boundaries with significantly segregative effects, although for the most part it avoided obvious gerrymandering. Many of the schools affected by segregative boundary changes were subsequently closed, and other schools lost their status as predominantly minority schools bordered by schools with much lower percentages of minority students when minorities moved into the residential areas of the bordering schools.

– A number of existing schools do have peculiar-looking attendance boundaries. Randolph has an arm jutting out to the east. Stout and Quinton Heights both include areas to the north and east some distance away from the school building. In the case of Randolph and Stout, the extensions have a desegregative effect. The reverse is true of Quinton Heights' current boundaries. *See infra* Part V B(2)(c)(v). As far as the record reflects, the current boundaries of Randolph and Stout are the only

examples that Topeka has manipulated attendance boundaries in order to desegregate. Again, when it altered attendance boundaries the school board failed to use the opportunity in most instances to further desegregation, despite its affirmative duty to do so.

As the district court acknowledged, the most serious example of segregative attendance boundaries is Lowman Hill. Lowman Hill's attendance area is a more or less square area with the school located in the center. Plaintiffs point out that this area includes, and has included for the last 25 years, two areas of heavy minority population. These areas are now part of a general central Topeka minority population, but were relatively isolated when Lowman Hill's boundaries were first drawn to include them. Within the last ten years, three elementary schools bordering the Lowman Hill area, one with a minority student percentage significantly lower than Lowman Hill's, have closed.[85] The closings did not affect the minority student percentage at Lowman Hill. It remains a school with a heavy minority percentage bordered by schools with much lower minority percentages. It also remains the school whose attendance boundaries include the only significant group of minority population in the northwestern

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[85] Clay closed in 1975. At the time, Clay had approximately 25% minority students while Lowman Hill had approximately 45%. Rec., vol. III, at 282-83. Student Tables, 1975. Polk closed in 1979, and Central Park in 1980. Rec., vol. III, at 290-92.

quarter of the school district. *See infra* Part VI B(2)(c)(vi).

The history of Lafayette is similar although not as extreme. The boarder between Lafayette and State Street, the school to Lafayette's north, has functioned as the boundary between the mostly white area served by State Street and the school to its north and the heavily minority area served by Lafayette and the schools to its south and southwest. Lafayette has long had twice the minority population of State Street; thus, since 1966, Lafayette's minority population has ranged from 52% to 69% while State Street's has ranged from 27% to 34%.[86] *See infra* Part VI B(2)(c)(iv).

While the boundaries of Loman Hill and Lafayette are consistent with a neighborhood school policy, as held by the district court, the original decisions to draw them to include the black population of the area had a segregative effect which the school district has never undone. The school district may not draw segregative attendance boundaries, maintain them for decades, and then take shelter behind the neutrality of its recent inaction. *See Swann*, 402 U.S. at 21.

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[86] Student Tables, 1966-1985.

iv. Location of new schools

All of the elementary schools and all but one of the secondary schools opened by the school district since *Brown II* were built in the white outer part of the district. Robinson middle school, which serves the central part of Topeka, is the sole exception. Furthermore, many of these schools were built near to the edges of the district. Plaintiffs criticize both the location of these schools and the fact that they opened at all. With respect to the location, they argue that Topeka deliberately placed new schools as far as possible from minority residential areas in order to polarize the district into white outer and minority inner schools. With respect to the new schools themselves, they argue that Topeka should have taken advantage of the underutilized inner schools; that is, that Topeka should have voluntarily bused white children from outer Topeka to the inner city schools instead of putting up new buildings.

Almost all of the building in question took place in the late 1950s and early 1960s, before the Supreme Court made clear that prior *de jure* school districts must do more than operate a neutral system. *Green*, 391 U.S. 430. Moreover, the city was annexing new territory during that time, a matter beyond the control of the school district, and it if not entirely unreasonable for the district to build schools "where the children are." Nevertheless, the erection of so many schools devoted to educating white children had a significant segregative effect on the

district. *See infra* Part V B(2)(a)(i). While the building of new schools to accommodate an influx of white children arguably had a legitimate basis at the time, the school district did nothing to diminish the segregative effect of those schools, even after it became clear that school districts under an unfulfilled duty to desegregate must do more than operate a facially neutral neighborhood school system. As we have said, neighborhood school plans are permissible *if* they are effective in actually reducing segregation. School openings and locations are a crucial variable in such plans. *Swann*, 402 U.S. at 20-21. In Topeka, school openings under the neighborhood school plan in fact worked to increase segregation. A school district conscious of its constitutional duty would have attempted to counteract that effect. *See Diaz v. San Jose Unified School District*, 733 F.2d 660, 667-69 (9th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1065 (1985). Topeka did nothing.

v. School closings

In contrast to school openings, the majority of school closings took place in the central and middle parts of Topeka. Like school openings, this pattern was dictated largely by the population shift to the outer part of the school district. Plaintiffs do not contend that schools were closed for any other reason, or that the impact of the closings was borne primarily by minority students. They focus instead on the *effect* of school closings, primarily on the

opportunity closings provided for more equitably distributing students to other schools. They contend that school closings of highly segregated schools were not desegregative in practice because the school district simply reassigned the students at those schools *en masse* to a nearby school which then took over the segregated status of the school closed. The evidence supports this contention for the 1950s and 1960s. Although most of the receiving schools remained schools with a majority of white students, plaintiffs argue that these reassignments served to identify the schools to which the school district would subsequently channel minority students. School closings in the 1970s and beyond had less segregated effects. In this decade, the effects of closings have been mixed. A few school closings were desegregative. These later closings have not completely undone the effect of the earlier closings, however. On the whole, most school closings in the 1970s cannot be said to be either segregative or desegregative.

In sum, although the hiring of minority faculty and staff became nondiscriminatory, and even included significant representation of minorities in management, the district nevertheless maintained racial imbalance in the assignment of faculty and staff. In addition, the location of new schools intensified the system's dual nature. The drawing of attendance boundaries and other means of reassigning students were rarely used to desegregate. The closing of schools is the most significant

desegregative device Topeka utilized. Even here, it is only in a few cases that a closing can unqualifiedly be characterized as desegregative. As we stated earlier, Topeka notably failed to focus its efforts on the complete eradication of the effects of prior segregation.

c. Individual schools

The dissent spends a great deal of time attacking our analyses of individual schools. The main point of that attack is that the increasing minority percentages for these schools resulted from demographics, not from school board actions. As we have previously stated, however, a school district is not absolved by demographics from its affirmative duty to desegregate before it achieves unitariness. *See* supra at 58-60 [App. 64-67b].

Plaintiffs describe the history of the school district as one of targeting certain schools as minority. According to plaintiffs, while the identify of those schools shifts as population moves, the district as a whole is always polarized into schools with clear racial identities. We therefore consider what the district did and did not do with respect to individual schools.

i. Belvoir elementary school

Belvoir is and has been since the 1960s a school with one of the highest minority populations in the

district. The school was annexed in the late 1950s and lies on the eastern edge of the current district boundary. Two federal housing projects were built within its attendance area in 1963 and 1965. Since 1966, its student population has never been less than 50% minority.[87] It is located in an area of minority population that was bordered by white populations to the north and south and a minority population to the west when the school was annexed. The bordering areas are now all areas with substantial minority populations.

Belvoir's boundaries were once altered to take in part of the attendance areas of a school that was closed. That closing did have a modest desegregative effect at Belvoir, but it did not change Belvoir's status as the school with the highest minority percentage in the system. Although it is no longer surrounded by schools with markedly lower minority percentages, it remains an east-side minority school as opposed to the west-side white schools. It cannot be said that the neighborhood school plan has been effective in desegregating Belvoir.

ii. Hudson elementary school

The school district built Hudson in 1963 in newly annexed territory. It is on the southeastern edge of the district and opened as a primarily white school. While the passage of time has dissipated

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[87] Student Tables, 1966-1985.

Hudson's identify as a white school, this change is due solely to the spread of minorities into its attendance area, not to any action by the school district. The school was 46.55% minority in 1985-76 [Sic. 1985-86]. Rec., ex. vol. IV at 171.

iii. Highland Park North elementary school

Highland Park North was annexed to the school district in the late 1950s. Its percentage of minority students has risen significantly over the years: 21.6% in 1966, 42.1% in 1975, and 57.9% in 1985. This rise was paralleled by a shift in the surrounding residential population from primarily white to heavily minority. This shift is characteristic of the eastern part of the city, where Highland Park North is located. The only significant action the school district took with respect to Highland Park North was to assign it Parkdale students when that school closed. This reassignment increased Highland Park North's minority percentage at a time when it was already high.

iv. Lafayette elementary school

Lafayette was a white school in the Topeka school system at the time of *Brown I*. It was 13.7% black at the end of the four-step plan in 1956. Federally subsidized housing projects were built in Lafayette's area in 1961 and 1962. By 1966, the school was 54.5% minority (26.1% black). The

school was then a transition school between Parkdale elementary school to the southwest, with 85% minority students, and Sumner, State Street, and Rice elementary schools to the north and east, with 12.3%, 27.5% and 3% minority students, respectively. Belvoir, to the south, had approximately the same percentage of minority students. Lafayette has remained 55-65% minority (25-50% black). In 1985, Lafayette was 56.8% minority (41.4% black). It remains a transition school between schools with higher minority percentages to the south and lower percentages to the north and west.

The closing of three schools affected Lafayette's boundaries. We have insufficient information to evaluate one closing, in the 1960s, and the other two closings had negligible effects on Lafayette's minority percentages. Under its neighborhood school plan, the school district simply maintained Lafayette as a school with disproportionate minority percentages.

v. Quinton Heights elementary school

Quinton Heights was a white school at the central southern part of the school district in the 1950s. At the end of the four-step desegregation plan it was 7.3% black. In 1959, Pierce, an annexed black school, and in 1964, Van Buren, a formerly all-white school, were closed and some of their students sent to Quinton Heights. Quinton Heights' attendance boundary was extended to the north as a

result.[88] By 1966, its minority student percentage was 36.4%. It was bordered by heavily minority Monroe elementary school to the northeast and otherwise by primarily white schools, including schools to the south annexed in the late 1950s.

Plaintiffs characterize the reassignments in the 1960s as part of a process of focusing Quinton Heights as a school for black students. In 1966, Quinton Heights' minority student percentage was seventh highest out of thirty-five elementary schools, and its minority population bordered two schools with much lower minority percentages (Central Park, with 15.5%, and Polk, with 11.5%). Indeed, on the maps available to us, it is quite noticeable that Polk's boundaries in 1970 correspond closely to a patch of white population surrounded by minority population assigned to other schools, including Quinton Heights.[89]

Two adjacent schools were closed during the 1970s. Each time, Quinton Heights' boundary was extended northwards. It is thus clear that Quinton Heights' current boundaries are the result of continued manipulation by the school district. They extend far into minority areas to the north and east of

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88 Rec., vol. III, at 249-51, 254-55. The area assigned to Quinton Heights when Van Buren closed was apparently empty of people at the time. The school district had already extended Quinton Heights into Van Buren's attendance area before Van Buren was closed, however. Rec., vol. III, at 251-53.

89 Rec., vol. I, at 48.

the school building and cross many natural barriers.[90] Quinton Heights is a "neighborhood" school only in the sense that some of its students do live in the immediate area of the school buiding. Most do not. Quinton Heights is entirely the product of the school district's actions; as such, the district may not disclaim responsibility for the makeup of the students who attend it.

vi. Lowman Hill elementary school

Lowman Hill was a white school in the pre-*Brown* Topeka school system. It had 17.4% black students at the end of the four-step plan in 1956. During the next decade a number of small adjustments were made to optional attendance zones around the school. Plaintiffs describe these adjustments as a process of drawing Lowman Hill's boundaries to include as many black and as few white students as possible. In 1959, an all-black school, Buchanan, was closed and its students sent to Lowman Hill. By 1966, Lowman Hill was 49.6% minority. The minority percentage at the five surrounding schools ranged from .2% to 15.6%. It is noticeable on the maps in the record that in 1970 Lowman Hill's boundaries included the only two

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[90] Rec., vol. III, at 291-92, rec., vol. X, at 1536, rec., ex. vol. V, at 227.

significant areas of minority population in that part of Topeka.[91]

Lowman Hill's minority student percentage has ranged in the 40s since that time, dipping briefly into the high 30s in the early 1980s. It was not affected in any significant way by the reassignment of students due to the closing of neighboring Clay elementary school in 1975 and Polk in 1979; while its boundaries expanded somewhat, the student population it acquired was apparently of the same makeup as its existing population. Thus, the history of Lowman Hill is that the boundaries drawn in the 1950s and 1960s largely remain, as do their effects. Lowman Hill still has a significantly higher minority student percentage than its neighbors, although the disparity between them is less (in 1985, Lowman Hill was 41.9% minority while its four neighbors ranged from 7.7% to 31.5%). The school appears to have been designed and maintained as a school with a concentration of minority students. At best, it has been neglected in recent decades. *See infra* Part V B(2)(b)(iii).

vii. Predominantly white schools

Eight elementary schools were at time of trial and have been during the course of this litigation

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91 Rec., ex. vol. I, at 48.

primarily white schools.[92] Even in 1985, only three of these schools crossed the 10% minimum that the school district's expert proposed, and did so only just barely.[93] The schools are in or near the western part of the district. Similarly, at the time of trial two middle schools and one high school -- one-third of the secondary school system -- were, and had been since they opened, primarily white schools. They too are in the western part of Topeka.

Plaintiffs focus on Topeka West High School as the quintessential example of deliberate channeling of white students to schools in the western part of the school district. The school was opened in 1961 six blocks from the western edge of the school district, the part of the district most distant from centers of minority population. Consequently, it was then and remains now a school with more than 90% white students, while the percentage of minority students at the other two high schools has been higher than average. Little evidence was introduced on the other white schools that has not already been discussed elsewhere. *See infra* Part V B(2)(b)(iv). To summarize, these schools were either annexed or built by the school district in the late 1950s and early 1960s. They opened as white schools with white

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92 The schools are Bishop, Crestview, Gage, McCarter, McClure, McEachron, Potwin, and Whitson.

93 Bishop was 10.5% minority, McEachron was 10.3% minority, and Whitson was 10.2% minority.

faculty/ staff and have largely remained so. The school district offered no evidence that it had ever attempted to eliminate these schools' identity as schools for white children.

3. Maximum Practicable Desegregation in Topeka

We look at last away from what has been done and what should have been done to what can still be done. The feasibility of further measures was not a focus of the case, and there was little evidence on the question. The district court explicitly found that "[a]t any time, more could have been done to achieve racial balance in the schools." Other courts that have found school systems to be unitary have specifically found that additional desegregation was impracticable.[94] Similarly, courts have refused to find school systems unitary where greater integration is achievable.[95]

It is apparent from this record that further desegretation in Topeka is not constrained by

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[94] *See, e.g., Morgan v. Nucci*, 831 F.2d at 323 ("little more can be done to integrate these schools given the available numbers of white students"); *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d at 229 (district court concluded that further measures would be impractical).

[95] *See, e.g., United States v. Lawrence County School Dist.*, 799 F.2d at 1047 ("greater balance of students by race achievable").

geographic obstacles as in some other cities.[96] Furthermore, out of the panoply of desegregation tools that have been developed, Topeka at present apparently uses only one: its minimally effective majority-to-minority transfer plan. We have no reason to think that Topeka has exhausted the repertoire available for desegregating schools. For example, it has failed to try magnet schools or to aggressively encourage voluntary transfers to improve racial balance.[97]

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[96] *Cf. Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987) (harbour and concentration of black population in certain districts); *Stout v. Jefferson County Bd. of Educ.*, 537 F.2d 800 (5th Cir. 1976) (mountain range and dangerous roads).

[97] In this regard, the district court questioned defendants' expert Dr. Armour about these possibilities. The questions and answers are instructive:

> "THE COURT: . . . .
>
> "Let me ask you a layman's question here. Say we have a school that has a 55 percent minority or 60 percent minority, and we want to change that situation, and try to get it down below 50 percent minority. Has there been any experience in anything that you have run into where they have gone into what you might call a voluntary busing program where you would ask the people in that community voluntarily to come forward, and allow their children to go to another area to try to redress the racial -- have you had any experience on that, or do you know of any experiences on that, or is that fanciful to think that that might happen?

Indeed, there is every reason to believe that

THE WITNESS: Not at all. In fact that can be done. It can be done without the mandatory assignment, and has been done in many school districts, in fact with schools a lot more imbalanced than 55 percent minority.

What you try to do in those cases is two-fold. One, you have an M to M program usually with transportation provided. You really encourage and do a lot of publicity and a lot of encouragement of the minority transfers out of that school, so that helps by reducing the minority population because they will frequently -- minority students will frequently, given the incentives, transfer out of that school to a predominantly white school in a different part of the district.

Other [sic] thing you do in a school like that generally that is successful is you put a special program in a magnet, call them a magnet program. White parents or white students will generally not transfer out of a predominantly white area neighborhood school into a school that is predominantly minority without an academic incentive, usually because they unlike some of the minority parents they feel their school is doing a fine job. So you will need to offer an attractive program. We have learned that computer science magnets, business, health professions. Depending upon the grade level, there are programs that are very attractive to white parents, and will actually induce them to transfer into that school.

The combination of those two can frequently bring a school into the composition that you want."

Rec., vol. XII, at 2638-39 (emphasis added).

further desegregation in Topeka is feasible. The present commitment of the school board and district administration, the already widespread distribution of minorities, and the expected continued movement of minorities into western Topeka should make the course of further desegregation relatively smooth.

It was suggested at trial that further desegregation is, in effect, not worth the trouble. Under questioning from counsel for the State Board of Education, plaintiffs' expert Foster admitted that in the 1985 school year the movement of only 265 elementary students, or 3% of all elementary students, and 77 secondary students, or 1.2% of all secondary students, would have been sufficient to bring all of Topeka's schools into plaintiffs' 15+/-% range. Dr. Foster pointed out that this figure was arrived at by simply removing students from schools outside the 15+/-% range, without analyzing where they would go or which students would take their place. The actual movement of students would thus be more complex and burdensome than the numbers suggest. Dr. Foster also pointed out that such an approach would move schools now just beyond the 15% range to just within it, an improvement he did not find greatly desegregative as it would preserve the existence of schools differing by 30% in their minority percentage and thus still marked as minority

or white schools.[98] A similar analysis was performed with respect to faculty/staff.[99]

The exercise above is illuminating in a number of respects. First, it indicates again that the desegregation plan which must be developed may not be too burdensome, a circumstance for which all can be thankful. Second, it reminds us of the dangers of focusing on numbers alone. Although numbers are usually the focus of desegregation plans, racial balance in itself is not the goal. The goal is to wipe out the effects of prior segregation. Setting target ranges is one means to that goal. It is clearly not the only one. Furthermore, as we have emphasized, schools are not racially identifiable by student and faculty assignment alone.

The lack of evidence or any attempt to argue that further desegregation is impracticable is perhaps the largest flaw in the school district's case. When the law requires the maximum desegregation reasonably feasible, and evidence suggests that more can be done, unitariness must await the implementation of those further steps. When it can be said that Topeka can do no more to eradicate the

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98 Rec., vol. VI, at 794-801.

99 The faculty/staff analysis was performed for 1981, the only year for which there is faculty-alone data. Dr. Foster concluded that the movement of 25 faculty/staff, or approximately 3% of total faculty/staff, would satisfy plaintiffs' formula. This 25 includes the movement both out of and into schools. Rec., vol. V, at 663-64; rec., vol. VI, at 764-67, 773-74.

effects of past segregation and segregative acts, the Topeka school system may be declared legally unitary.

C. Conclusion on Unitariness

After reviewing the record, we have concluded that there is a current condition of segregation in Topeka. Contrary to the district court, we are convinced that this condition is causally connected to the prior *de jure* system of segregation. This causal connection for the most part does not stem from active promotion of segregation. Topeka has generally heeded the prohibition against this form of discrimination.

Our basic disagreement with the district court is centered around the fact that the duty to desegregate requires more. What Topeka did not do is actively strive to dismantle the system that existed. It opened and closed schools with little or no thought given to the effect of such actions on segregation, and observed the segregative or desegregative effects of such actions with indifference. Even those school board decisions that had some desegregative effect were not carried out in such a manner as to disestablish the dual system. For example, rather than integrate the former *de jure* black schools, Topeka gradually closed them. Their students were then reassigned virtually *en masse* to other schools, which then took on the same minority-school identity.

The shifting distribution of Topekans throughout the city sometimes hindered, sometimes aided, the cause of desegregation, but the school district sought neither to reduce the impact of the former nor to encourage the effects of the latter. It simply administered the system, with due regard for economic efficiency and the quality of education in the district, but without a commitment to undoing the segregated structure of that education. Consequently, it permitted Topeka's schools to fall into three categories: schools that are now and always have been white, schools that are now and long have been heavily minority, and others. As we have noted, the mere existence of racially identifiable schools does not violate the Constitution. Where prior *de jure* segregation exists, however, we are convinced that permitting white schools and minority schools to remain racially identifiable as such without significant efforts to the contrary is in effect to permit the continuation of a dual system of education. Based on the evidence set out above, we have a definite and firm conviction that the district court erred when it found the Topeka school system to be unitary. *Cf. Pitts v. Freeman*, 755 F.2d 1423 (11th Cir. 1985); *Diaz*, 733 F.2d 660; *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980) (en banc); *Brinkman v. Gilligan*, 583 F.2d 243 (6th Cir. 1978), *aff'd sub nom. Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).

VI.
TITLE VI

Plaintiffs argue that the school district violated both section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and 34 C.F.R. § 100.3(b). Section 601 forbids programs and activities receiving federal funds from discriminating on the basis of race, among other factors,[100] and 34 C.F.R. § 100 contains regulations implementing Title VI. The Topeka school system receives federal funds.

The Supreme Court held in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that discrimination under Title VI is to be measured by the constitutional standard of the Equal Protection Clause. *Id.* at 284-87. Because we have concluded that Topeka's school system is not unitary under constitutional standards, we necessarily reverse the district court's holding that the school district has not violated Title VI.

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[100] Section 601 reads:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. § 2000d (1982).

VII.
STATE DEFENDANTS

The state of Kansas intervened as a defendant in *Brown I* to defend the constitutionality of the Kansas law permitting segregation. It was not again actively involved in the litigation of the case until May 1980, when the Governor and members of the State Board of Education were joined as defendants for the purpose of granting injunctive relief.[101] The district court granted summary judgment before trial for the Governor on both the constitutional and Title VI claims. After trial, it held that the State Board of Education was not responsible for the racial conditions in the Topeka school district. We affirm both of these rulings.

The supreme executive power of the state of Kansas is vested in its Governor, who "shall be responsible for the enforcement of the laws of this state." Kan. Const. art. I, § 3. One of the Governor's powers is that of reorganizing state executive agencies. "[C]onstitutionally delegated functions of state officers and state boards" are exempt from this reorganization power. *Id.* § 6(a). The State Board of Education is such an exempt state board. *Id.* art. 6, § 2; *State ex rel. Miller v. Board of Education*, 511 P.2d 705, 709 (Kan. 1973).

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[101] The state had been dismissed as a party to the action in 1979. Brief of Appellee John Carlin at 3.

Because the State Board of Education is the Kansas organ of government responsible for education, these provisions limit the Governor's executive power over education to that embodied in the power to enforce the laws of Kansas. Plaintiffs have not suggested that any Kansas law is now implicated in this litigation. The Governor is not vested by the provisions cited above with the power to enforce federal law, and plaintiffs have not shown any other source of such power. The district court was correct in concluding that the Governor is not able, under state law, to comply with such injunctive relief as may be ordered in this case. It was therefore proper to dismiss him from the case.

The correct disposition of the case against the members of the State Board of Education is more difficult to resolve. Kansas, like many other states, assigns the primary responsibility for the day-to-day management of public schools to local school authorities. *See* Kan. Const. art. 6, § 5. At the time of *Brown I*, the Kansas Constitution provided for a Superintendent of Public Instruction with limited authority. In particular, this officer did not have the authority to exercise general supervision of the public schools. *Miller*, 511 P.2d at 708. Apparently, the only method used by the state to encourage segregation was the permission granted by the law struck down in *Brown I* for segregation below the high school level. The Kansas legislature promptly repealed this statute in its next full session after *Brown I*, and has since enacted civil and criminal

laws against racial discrimination. *See* Kan. Stat. Ann. §§ 21-4003, and §§ 44-1001 et. seq. This history is in contrast to the actions of other states that have been held liable for promoting segregation.[102] Moreover, the state was never held expressly liable for the actual segregation in Topeka's schools.

It is not necessary for us to decide whether requiring more of the state at this point would be consistent with the principle that a remedy may be no broader than the scope of the violation found, because plaintiffs have not shown that the State Board of Education has the power to act as they would have it act. The Kansas Constitution provides both for the

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102 *See Milliken v. Bradley*, 433 U.S. 267 (1977) (affirming remedy based in part on state liability); *Milliken v. Bradley*, 418 U.S. 717 (1974) (state provided funds for transporting white students but not for desegregative busing, enacted laws designed to delay desegregation plan and maintain segregation, rescinded city's voluntary desegregation plan, and approved school sites and construction with segregative results); *Liddell v. State of Missouri*, 731 F.2d 1294, 1298 (8th Cir.) (state constitution mandated segregation until 1976 and state took no action to desegegate schools after *Brown I*), *cert denied*, 469 U.S. 816 (1984); *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 714 F.2d 946, 948 n.2 (9th Cir. 1983) (listing state policies and acts that helped to maintain segregation), *cert. denied*, 467 U.S. 1209 (1984). Furthermore, in both *Milliken* and *Los Angeles Branch NAACP* there was clear state law giving the state, as opposed to local school authorities, a prominant role. *See Milliken*, 418 U.S. at 726 n.5 (Michigan constitution assigns "the whole subject" of education to the state); *Los Angeles Branch NAACP*, 714 F.2d at 949 (listing California cases detailing responsibility of state organs to aid in desegregation).

State Board of Education and for locally elected school boards. The State Board is given the power of "general supervision" of the local boards. Kan. Const. art. 6, §§ 2, 5. The Kansas Supreme Court has defined this power as "something more than to advise but something less than to control." *Miller*, 511 P.2d at 713. Among the powers of the State Board is accreditation of schools. Plaintiffs argue that the State Board could have withheld accreditation of segregated schools, citing evidence that the Board is empowered to withhold accreditation on this basis.[103] The evidence refers, however, to hypothetical situations such as an official policy of not hiring black teachers or complete segregation of students. This does not establish that the State Board had the power to deny accreditation under the acts of this case. In addition, exhibits in the record show that the State Board was aware that there was actual segregation in some Kansas cities, and drew up a number of proposals to provide advisory assistance to these cities in desegregating.[104] These proposals are consistent with the State Board's argument that its role is primarily advisory in the area of desegregation.

Kansas statutes authorize local school boards to appoint employees to serve at the board's pleasure, set attendance boundaries, open and close schools,

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103 Reply Brief for Plaintiffs-Appellants, plaintiff's exhibits 45, 47.

104 *See, e.g.*, rec., ex. vol. II, at 190-235.

and adopt all necessary rules and regulations. Kan. Stat. Ann §§ 72-8202e, 72-8212, 72-8213. These tools are the primary means of desegregating. No evidence suggests that the State Board exercises control over these tools. Plaintiffs argue that after *Brown I* some agency of the state had a duty to ensure that desegregation occurred. We are not persuaded that any authority other than the Topeka school district had then or has now the power to desegregate Topeka's schools.

VIII.
CONCLUSION

In concluding, we begin by stressing what we do not have in Topeka. We do not have a school system or a community actively resisting desegregation. Nor, on our record, has Topeka ever interposed the kind of obstacles to desegregation found in other cities. In recent times, the school district has won national recognition for its innovative work on its curriculum and has been honored with various awards for the excellence of its schools. In short, the Topeka school district is actively engaged in improving the education of its students.

This active engagement has largely been directed at concerns other than desegregation, however. Once the four-step plan approved by the district court in the 1950s was implemented, Topeka did not until very recent times, on our record, give

serious consideration to the question of whether the duty imposed by *Brown II* had been fulfilled, save under the urging of HEW. Although that urging led to distinct improvements, for the most part the Topeka school district has exercised a form of benign neglect. The duty imposed by the Constitution, and articulated in numerous cases by the highest court in this land, requires more.

We reverse the finding of the district court that the Topeka school system is legally unitary. We remand the case to the district court for the formation of an appropriate remedy.

APPENDIX C

No. 87-1668, Oliver Brown, et al. and Charles Smith and Kimberly Smith, Minor Children, By Their Mother and Next Friend, Linda Brown Smith, et al., v. Board of Education of Topeka, Shawnee County, Kansas, et al.

BALDOCK, Circuit Judge, dissenting.

It is not by accident that the court begins its opinion in the liability phase of this case with a quote from the plaintiffs' expert, Mr. William Lamson.[1] For in deciding that the U.S.D. 501 school board operates a dual school system with respect to student assignment, the court has relied heavily on the

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[1] Mr. Lamson is a demographic consultant, whose principal source of income is fee applications from desegregation cases. Rec. ex. vol. V at 4; vol. II at 372. Mr. Lamson does not appear to have pursued any formal study in the field of demographics; indeed, his resume candidly reports that he has no degrees, advanced or undergraduate. Rec. supp. vol. XII at 4. Despite Mr. Lamson's previous service in this field as outlined by this court, Court's Opinion at 2 n.1 [App. 3b n.1], the district court was free to accept or reject his conclusions.

While the district court acknowledged that segregation may continue of its own inertia, *id.* (quoting *Brown v. Board of Educ.*, 671 F. Supp. 1290, 1296 (D. Kan. 1987)), the district court specifically found that segregation had *not* so continued in this school district, rather "the effects of *de jure* segregation have been substantially countered." *Brown*, 671 F. Supp. at 1296.

plaintiffs' theory of the case as supported by the testimony of Mr. Lamson. In deciding that the board operates a dual system with respect to faculty assignment, the court has adopted the plaintiffs' theory in large part, but impermissibly has made its own factual findings after and *ad hoc* evaluation of the evidence. *See*, *e.g.*, Court's Opinion at 45 [App. 50b] ("We do not adopt plaintiffs' standard, but instead evaluate the data on its face.").

In this case, the plaintiffs contended that the school board operated a dual school system as evidenced by: 1) racial identifiability in student, faculty/staff assignment, 2) inferior facilities, equipment, curriculum and instruction at schools with higher black enrollments, 3) lower minority test scores, and 4) survey attitudes indicating that some schools were perceived as white schools and others as minority schools. *See generally* rec. vol. I, doc. 242 (amended complaint).[2] On the other hand, the defendants contended that the plaintiffs' measures of "racial identifiability" alone, given the historically small percentage of minority students and faculty/staff did not indicate a current condition of intentional segregation based upon either 1) present discrimination or 2) a failure to eliminate the vestiges of past state-imposed

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[2] The record on appeal in this case generally will be identified as Rec. vol. # or supp. vol. #, indicating pleadings or transcript. Selected exhibits, which were paginated and bound by the parties in five volumes, will be identified as Rec. ex. vol. #.

segregation. Defendants suggested that *de facto* and racially neutral considerations, rather than *de jure* segregation, explained the assignment of students and faculty/staff.[3] Defendants also contended that recent school boards were committed to pursuing racial balance in student, faculty/staff assignment, and equal educational opportunity. Finally, defendants relied upon the implementation of two desegregation plans after *Brown v. Board of Educ. (Brown I)*, 347 U.S. 483 (1954), and explained other steps taken to achieve and maintain a unitary system. The district court found in favor of the defendants on all issues and declared the system unitary. *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987). On appeal, plaintiffs

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[3] The difference between *de jure* and *de facto* segregation has been described as follows:

> De jure ("by law") segregation is racial separation which is the product of some purposeful act by governmental authorities. De facto ("by the facts") segregation occurs because of housing and migration patterns and is unconnected to any purposeful governmental action to racially segregate schools.

2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* § 18.9 at 413 (1986); *see also Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971). *De jure* segregation violates the equal protection clause, but "if a school district become unintentionally (de facto) segregated, there is no constitutional violation." R. Rotunda, J. Nowak & J. Young, *supra*, at 413.

challenge the district court's judgment concerning student and faculty/staff assignment.

If appellate courts were empowered to make findings of fact, perchance the approach of this court on the issues of student and faculty/staff assignment could be justified. But for reasons which the Supreme Court has made clear, we must accept the factual findings of the district court unless they are clearly erroneous. Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985); *see also Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 792-93 (6th Cir. 1982). Although this court acknowledges that the district court's finding of unitariness must be upheld unless clearly erroneous, Court's Opinion at 15 [App. 16b], the court has failed to give effect to this principle. Instead, this court has duplicated "the role of the district court" and has impermissibly engaged in "an exercise in appellate factfinding." *See Jenkins v. Missouri*, 807 F.2d 657, 667 (8th Cir. 1986) (en banc). This is apparent throughout the court's opinion, but is especially salient in the court's characterization of what *really* occurred in Topeka during each decade subsequent to *Brown I*, a characterization which totally ignores the district court's findings and forgets that we do not try cases at the court of appeals. *See* Court's Opinion at 52-61 [App. 58-68b]. The same evidence that the district court found wanting this court accepts.

This court is "engaging in an original evaluation of the voluminous and ofttimes contradictory record seeking an ultimate conclusion more satisfactory than that reached by the district court." *Jenkins*, 807 F.2d at 668.

The court claims that the district court erred because it misunderstood the burden of proof in this desegregation case. Court's Opinion at 2, 35 [App. 3b, 38b]. If that is true, why does the court not remand the case to the district court for appropriate findings in accordance with the correct presumption and burden-shifting principles, given that this is very much a record case? *See infra* note 6; *Vaughns v. Board of Educ.*, 758 F.2d 983, 992 (4th Cir. 1985) (court remanded for new findings in light of correct legal principles). Instead, the court makes its own factual findings and remands the case for an appropriate remedy.

Moreover, I do not agree with this court that the district court "failed 'to apply the appropriate presumption and burden-shifting principles of law.'" Court's Opinion at 35-36 [App. 39b] (quoting *Brinkman v. Gilligan*, 583 F.2d 243, 251 (6th Cir. 1978), *aff'd*, *Dayton Board of Educ. v. Brinkman (Dayton II)*, 443 U.S. 526 (1979)). This court compares the district court's action with that of the errant district court in *Dayton II*. The comparison misses the mark primarily because, as this court points out, *Dayton II*, like most of "[t]he Supreme Court desegregation cases[,] involved school systems in which

the degree of segregation was sufficiently great that the parties did not seriously dispute on appeal that the plaintiffs had satisfied their burden on" ["the existence of a current condition of segregation."]. Court's Opinion at 18 n.17, 17-18 [App. 18-19b n.17, 18b]. While the "Dayton public schools [were] 'highly segregated by race'[.]"[4] Court's Opinion at 18 n.17 [App. 18-19b n.17] (quoting *Dayton II*, 443 U.S. at 529), this is not so in Topeka. Here, there exists a genuine issue of fact as to whether there is even a current condition of segregation, particularly in the absence of *any* one-race minority or virtually one-race minority schools in this district. To be sure, there are eight 90%+ white schools (ranging from 6.23% to 9.43% minority); however, those schools have steadily increase in minority enrollment over the years, and this is a system in which 31 out of 34 schools are majority white in student assignment. *See infra* note 18. Of the three schools that are majority-minority in student assignment, the greatest concentration is 61.86% minority. *Id.* This court's overinclusive approach to racial identifiability leads it to an incorrect finding that there is a current condition of segregation in Topeka.

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[4] At the time of the district court hearing in *Dayton II*, 44.6% of the students were black, 47 out of 68 schools were virtually one race (22 black and 25 white). *Dayton II*, 443 U.S. at 529, 30, n.1. This pattern of one-race schools in a system that was almost evenly composed of white and black students was present in 1951-52, 1963-64 and 1971-72. *Id.* at 537.

The court begins by saying that, in a former *de jure* system, a school is racially identifiable and part of a current condition of segregation if it deviates, plus or minus (±) 15% or 20% or some other arbitrary amount, from a system-wide average of minority composition. *See* Court's Opinion at 42-44, 49-50 n.59, 50-51 [App. 47-49b, 55b n.59, 56-57b]; *but see Price v. Denison Indep. School Dist.*, 694 F.2d 334, 360-64, (5th Cir. 1982) (statistical racial identifiability not necessarily indicative of liability). Numbers reflecting the racial composition of student and faculty/staff assignment within a school system are absolutely critical in both the liability and the remedial phase of a school desegregation case. However, statistical measures of racial identifiability are measures of racial balance, a valid sociological objective, but not a constitutional command with respect to student assignment. Nevertheless, this court determines that once a plaintiff has shown statistical racial identifiability in a former *de jure* system, the plaintiff has established a current condition of segregation. Court's Opinion at 18, 42-44 [App. 18-19b, 47-49b].

If a school is not racially identifiable as to student assignment by statistical measures, that certainly does not suggest an *absence* of segregation to this court. Rather one must look to a "broadly defined," Court's Opinion at 18 [App. 19b], concept of racial identifiability which considers "demography, geography

and the individual history of particular schools and areas of the city," in an effort to find liability. *Id.* at 21 [App. 22b]. Although the court acknowledges that one-race schools may evolve from "modern urban demography and geography," *id.* at 19 n.18 [App. 20b n.18], and that "the mere existence of racially identifiable schools does not violate the Constitution," *id.* at 87 [App. 95b], it completely fails to incorporate these observations in its analysis of this system. Nor does it consider other statistical measures relied upon by the district court which support a finding of no current condition of segregation and compliance with the affirmative duty to dismantle the dual system. *See id.* at 41-48, 58 n.71 [App. 45-53b, 64b n.71]. What the court has done is to apply an absolute presumption against the Topeka schools *from the outset* because of *de jure* status in 1954. Even if the presumption applies, the court has given no weight to the substantial evidence concerning *de facto* influences on racial composition in those schools. Although the court ratifies its conclusion concerning a current condition of segregation with descriptive references to geography, residential population and history, there is not attempt to consider causation in light of the substantial demographic testimony offered by defendants. *Id.* at 50-51, 58-61 [App. 56-57b, 64-68b].

The district court implicitly recognized, *Brown*, 671 F. Supp. at 1295, "that once a court has found an

unlawful dual school system," *School Bd. v. Baliles*, 829 F.2d 1308, 1311 (4th Cir. 1987), the plaintiffs are "'entitled to the presumption that current disparities are causally related to prior segregation, and the burden of proving otherwise rests on the defendants.'" *See* Court's Opinion at 25-26 [App.27b] (quoting *Baliles*, 829 F.2d at 1311); *see also Dayton II*, 443 U.S. at 537 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 210-11 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25-26 (1971) (discussing remedy once a violation is established). If the system has achieved unitariness, the presumption ends. *Baliles*, 829 F.2d at 1311; *Riddick v. School Bd.*, 784 F.2d 521, 543 (4th Cir. 1986).

In a former *de jure* system, plaintiffs may establish the prima facie case by proving that there is a current condition of intentional segregation, that the *de jure* system or its vestiges remain or were reestablished in part of the school system. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464, 467 (1979); *Keyes*, 413 U.S. at 200, 210. Even an isolated condition of current segregation, resulting from past or present segregative acts, would violate the affirmative duty to eliminate the dual system and its vestiges and to convert to a unitary system in which racial discrimination is eradicated. *Dayton II*, 443 U.S. at 537; *Columbus*, 443 U.S. at 459; *Swann*, 402 U.S. at 15; *see also* L. Tribe,

American Constitutional Law 1498-1500 (2d ed. 1988) (discussing Supreme Court school desegregation cases).

That critical finding shifts the burden of proof to the defendants because it provides "a sufficient basis for an inferential finding of system-wide discriminatory intent" which in turn will be applied to explain "racial separation in other parts of the school system." *Columbus*, 443 U.S. at 467-68. At that point, the defendants must come forward with "proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions." *Keyes*, 413 U.S. at 210. If intent cannot be disproved, the defendants must show that their "past segregative acts did not create or contribute to the current segregated condition," in the other parts of the system. *Id.* at 211; *see Dayton II*, 443 U.S. at 538 ("Board has a 'heavy burden' of showing that actions that increased or continued the effects of the dual system serve important and legitimate ends").

The district court correctly cited *Keyes* and *Swann* in its discussion concerning the burden of proof and noted that the factual justification in this case for the legal presumption was doubtful.[5] *Brown*, 671 F. Supp.

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[5] In allowing the current plaintiffs to intervene in this action, the trial judge correctly discussed the presumption and burden shifting

(continued...)

at 1295, 1295 n.4 & 5. I take this to mean that the plaintiffs simply had not proven a current condition of segregation (a constitutional violation) in the Topeka schools which would warrant sustaining the presumption. But the district court went further when it focused on the defendants and held that, in the alternative and regardless of any presumptions in favor of the plaintiffs, the defendants had proven the existence of a unitary system. *Id.* Merely because the district court properly discussed an absence of discriminatory intent does not negate the fact that in this record[6] there is evidence tending to show that any past segregative acts of this school district are not responsible for schools currently which do not approach the system-wide minority average. *See infra* pt. VII, p. 108 (analyzing schools which court claims are racially identifiable and segregated). Indeed, this court at various points acknowledges an absence of evidence of segregative intent by current school officials. Court's Opinion at 38 [App. 42b] ("we agree with the district court's findings that the current school administration is not presently acting with discriminatory intent"), *see also id.* at 68, 86 [App. 75b, 93-94b]; *but see id.* at 49, 67 [App. 54-55b, 74b] (concerning faculty/staff

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[5](...continued)
principles potentially applicable to this case. *Brown v. Board of Educ.*, 84 F.R.D. 383, 399-400, 401-02 (D. Kan. 1979).

[6] Trial of this matter lasted from October 6 to October 31, 1986, and consisted of the testimony of 37 witnesses, including 11 experts, and hundreds of exhibits. A 3,000 page trial transcript in 18 volumes was filed at the district court.

assignment in 1985-86, "it is difficult to posit a [racially] neutral explanation") & *id.* at 79 [App. 85b] ("It is thus clear that Quinton Heights' current boundaries are the result of continued manipulation by the school district."). The district court also considered circumstantial evidence of past segregative intent manifesting itself in the current system, concerning the prima facie case and beyond. Of course, the district court had much quantitative and qualitative evidence to evaluate. Having performed its required task, it found that "the district's student and staff assignment criteria do not have the *effect* of discriminating against students because of their race." *Brown*, 671 F. Supp. at 1310 (denying relief based on Title VI regulation) (emphasis added). Because the record supports the district court's determination that there is not unlawful segregation in Topeka and that the system is unitary, albeit on conflicting evidence, I respectfully dissent.

In its opinion, the court dismisses my dissent as a product of misconstruing the principles of school desegregation law. Court's Opinion at 23-25, 36 n.47, 40 n.51, 38 n.49 [App. 24-27b, 39b n.47, 44b n.51, 42b n.49]. Apparently, the court views the affirmative duty to eliminate segregation and its vestiges as completely independent from, if not inconsistent with, the intent inquiry. To be sure, those statutory dual systems operating at the time of *Brown I* automatically assumed an affirmative duty to eliminate not only the

dual system, but also the effects of that dual system on present school operations. *Keyes*, 413 U.S. at 200. However, the initial affirmative duty arises from the presence of intentional segregation whether once commanded by statute or practice.

Moreover, the intent inquiry is inclusive of whether a school board has acted affirmatively, not merely neutrally, to eliminate a dual system existing in 1954. A school board's proven failure to heed its affirmative duty and eliminate a dual system and its vestiges, whether that failure be by inaction or by conscious decision, is indicative of segregative intent and compounds the harm of an unconstitutional dual system. *See Columbus*, 443 U.S. at 461 ("Whatever the Board's current purpose with respect to racially separate education might be, it knowingly continued its failure to eliminate the consequences of its past intentionally segregative policies."); *see also Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968). In deciding whether a school system is unitary, the ultimate inquiry must be whether past or present segregative intent has been eliminated from the present school operations.

Thus, a current condition of purposeful separation may arise either from a failure to eliminate 1954 *de jure* segregation and its *effects* or by subsequent actions which are segregative in their own right. Stated another way, plaintiffs are entitled to a system-wide desegregation order upon a finding that there is current

racial separation which is the result of segregative intent, past or current. Plaintiffs are not entitled to a system-wide desegregation order based upon proven *de facto* racial separation not attributable to the actions of the school board. *Keyes*, 413 U.S. at 208 ("We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate.") (emphasis in original). Thus, contrary to this court's reading of my dissent, I agree that school board action which has the effect of failing to disestablish the dual system violates the school board's affirmative duty. *See* Court's Opinion at 24 [App. 26b] (quoting *Pitts v. Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985)); *Columbus*, 443 U.S. at 449.

I must reject however, this court's contention that "[t]his is not a liability case in which plaintiffs must prove that the school board has committed unconstitutional acts; that was established in 1954." Court's Opinion at 25 [App. 27b] (emphasis omitted). While this is not a case of initial liability, *id.* at 38 [App. 42b], it is not a case like *Swann*, *see* Court's Opinion at 25 [App. 27b], in which all parties agreed that the 1969 Charlotte-Mecklenburg school system was *not* unitary given the Supreme Court's 1968 *Green* decision, announced three years after the first desegregation plan implemented by that district in 1965. *Swann*, 402 U.S. at 7. In *Swann*, the issue was

whether the district court was correct in selecting among alternative desegregation plans put forth by the parties. *Id.* at 11. Contrary to this court's assertion, Court's Opinion at 25, 38 n.49 [App. 27b, 42b n.49], ours is not now a remedy case. Upon the reopening of this case in 1979, some 24 years after the first court-approved desegregation plan, the district court's task was to determine whether liability for the prior *de jure* system remained. Unlike *Swann*, the parties in our case hotly contested this issue.

If the liability inquiry in this case was frozen as of 1954 as suggested by the court, *id.* at 25 [App. 27b], we merely would decree a remedy based upon the failure of the school board to have absolute racial balance at every school and much of this court's opinion arguing that (1) there is a current condition of segregation, (2) the school board has failed to fulfill its affirmative duty, and (3) there is a link between present school operations and the prior *de jure* system, would be superfluous. The inquiry in this case is not so simple because two complex factual issues are involved. The first is whether current disparities in this case comprise a current condition of segregation given that there is not a single one-race minority or virtually one-race minority elementary, middle or high school, in this system. But if there is a current condition of segregation, the burden of proof would shift to the school board as discussed above. The next complex

factual issue in the case then becomes whether the effects of any past intentional segregation have been eliminated. An "essential predicate" for a system-wide remedy in this case is that the "Board's purposefully discriminatory conduct and policies, had current, system-wide impact." *Columbus*, 443 U.S. at 466 n.15. The court also claims that the defendants' experts, the district court and I have erred because we have considered the school board's proof that, having dismantled a dual school system, it is not liable for schools which do not approach the system-wide minority average in student assignment. *See* Court's Opinion at 58-60 [App. 65-67b]. Who could argue with the court's statement that demographic change does not excuse a school board's failure to comply with its affirmative duty to eliminate the effects of a dual system? *Id.* at 59-60 [App. 65-67b] (relying on *Vaughns*, 758 F.2d at 988, and *Lee v. Macon County Bd. of Educ.*, 616 F.2d 805, 809-10 (5th Cir. 1980)). In both *Vaughns* and *Lee*, the appellate court was concerned with virtually one-race minority schools which had not lost their racial identities. *Vaughns*, 758 F.2d at 991; *Lee*, 616 F.2d at 808, 811 (5 one-race minority schools). The disagreement between the court's opinion and my dissent on this point is that I view the school board as having accomplished its affirmative duty and having eliminated the effects that may be charged to a once-dual system. All virtually

one-race minority schools have been eliminated, and there are no schools on the threshold of virtually one-race minority status. In any event, the school board *is* allowed to prove that schools which do not approach the system-wide minority average are not the product of past or present segregative intent or, stated another way, the school board may prove that its recent and remote actions are not the cause of present racial imbalance. In *Keyes*, the Court recognized that school officials may defend by showing that current racial separation is not a product of past segregative actions. *Keyes*, 413 U.S. at 211. Although the passage of time does not make intentional segregative acts which occurred decades ago any less intentional, *id.* at 210-11, the *effects* of such action may well be attenuated, given the dynamic environment of a school system. The court's absolute refusal to consider this evidence is tantamount to imposing strict liability on the school board in the absence of perfect racial balance.

I.

This action began when the original plaintiffs challenged Topeka's maintenance of a segregated system of schools for grades kindergarten through six (K-6). *Brown v. Board of Educ.*, 98 F. Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955). At the time, Topeka operated 22 elementary schools, 18 for white

children and 4 for black children. *Id.* Many black children were bused a considerable distance to the 4 black schools. *Id.* at 798. The challenge involved both the contention that separate schools were inherently unequal and the contention that the physical facilities, curricula, faculty and student services of the black schools were inferior. *Id.* at 797-98. Circuit Judge Huxman, writing for a three-judge district court, adhered to precedent, *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held that separate but equal facilities were constitutional. *Brown*, 98 F. Supp. at 798-99; *see generally* In Memoriam, 474 F.2d preface at 13-14 (1973) (discussing judge's difficult decision). The district court entered as a finding of fact that the "physical facilities, the curricula, the courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable." *Brown*, 98 F. Supp. at 798. The judgment was appealed to the Supreme Court, with initial arguments during the 1952 Term.

During September 1953, and prior to the Supreme Court's opinion, the Topeka school board adopted a policy to terminate the maintenance of segregation in the elementary grades. Rec. ex. vol. II at 60. The board adopted the first step of a desegregation plan which terminated the white-only segregation at two elementary schools (Southwest & Randolph) and discontinued the board's supplied transportation to 15

black children in those districts. In January 1954, the board adopted the second step of the desegregation plan to become effective in September 1954. Rec. ex. vol. II at 61. The second step terminated the white-only segregation in 12 more elementary schools, eliminated transportation for black students in these 12 districts, and permitted black students to continue at their former schools, if desired. *Id.*

In May 1954, the historic decision of the Supreme Court reversed the three-judge district court. *Brown I*, 347 U.S. 483. The Court held that "the segregation of children in public schools solely on the basis of race" denied minority group children equal educational opportunities contrary to the fourteenth amendment. *Id.* at 493. with respect to the Kansas case, the Court expressly found that the non-elementary grade levels of the public schools were "operated on a non-segregated basis." *Id.* at 486 n.1. The Court did not alter the finding of the district court of substantial equality "with respect to buildings, transportation, curricula, and educational qualifications of teachers." *Id.* at 486 n.1.

In February 1955, the Topeka board adopted the third step of the desegregation plan to become effective in September 1955. Rec. ex. vol. II at 63. The plan addressed the four black elementary schools (McKinley, Buchanan, Monroe and Washington). Under the third step, McKinley was closed, and Buchanan, Monroe and Washington were placed within the general framework

of the elementary school attendance districts. *Id.* All elementary students affected were given the option of finishing elementary school in their present schools, with the exception of McKinley students. Children entering kindergarten in school year 1955-56 were given the option of attending the school they would have attended in 1954-55, had they been old enough.

Having decided the question of constitutional liability, the Court ordered further argument on a remedy and issued its next opinion concerning appropriate relief in May 1955. *Brown v. Board of Educ. (Brown II)*, 349 U.S. 294 (1955). The Court noted that "substantial progress" had been made in Kansas "from the transition to a system of public education freed of racial discrimination." *Id.* at 299. Recognizing that full implementation of *Brown I* might "require solution of varied local problems" by school authorities, the Court remanded this case to the three-judge district court for consideration of whether the actions of school authorities constituted a good faith implementation of *Brown I*. *Id.* School authorities were to make a "prompt and reasonable start toward full compliance" with *Brown I*. *Id.* at 300.

> Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to

> establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . . . They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.

Id. at 300-01. The district courts were to be guided by principles of equity and to retain jurisdiction during the transition period. *Id.* In June 1955, the Supreme Court mandate ordered the district court to take such actions "as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the partes to these cases." *Id.* at 301.

On remand, the district court held a hearing on the formulation of a decree and judgment. In October 1955, the panel approved the plan already adopted and partially implemented by the Topeka board "as a good faith beginning to bring about complete desegregation."

Brown v. Board of Educ., 139 F. Supp. 468, 470 (D. Kan. 1955) (per curiam). The court characterized the plan as
follows:

> The central principle of the plan is that hereafter, except in exceptional circumstances, school children irrespective of race or color shall be required to attend the school in the district in which they reside and that color or race is no element of exceptional circumstances warranting a deviation from this basic principle.

Id. at 469. The court noted that in several respects, which were minor and not discussed, the plan did not comply fully with the Supreme Court mandate. *Id.* One serious objection to the plan was that part which permitted kindergarten children to attend the school which they would have attended had they started school one year previously. But because that part was temporary and not part of the permanent plan, it did not defeat a finding of good faith.

At the hearing, the plaintiffs objected to certain schools, such as Buchanan, remaining all black. The district court rejected this as a defect in the plan, stating:

> Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school because of race or color.
>
> If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live.

Id. at 470. In 1973, the Supreme Court indicated that this limited interpretation of *Brown* was rejected in 1968 by its decision in *Green*, 391 U.S. at 437-38. *Keyes*, 413 U.S. at 200-01 n.11. Meanwhile, the district court retained jurisdiction of this case for the purpose of entering a final decree pending full compliance with the Supreme Court's mandate to desegregate. The court's order approving the plan was not appealed.

In December 1956, the Topeka board considered the fourth step of its plan to comply with the Supreme Court's mandate in *Brown II* as ordered by the district court. Rec. ex. vol. IV at 120. This final step of the plan was to become effective in September 1956, and eliminated the kindergarten option provision criticized

by the district court. Rec. ex. vol. II at 66. The plan also required all elementary students moving into districts, not designated as optional districts between two or more elementary schools, to attend the elementary school in the requisite district, subject only to traditional exceptions. *Id.* at 66. Two board members opposed the plan's optional features as prolonging the time before complete integration. *Id.* at 67. Concern was expressed about the future of the teachers at the *de jure* black elementary schools. *Id.* Notwithstanding, the superintendent, under questioning from the board, indicated that no additional steps were contemplated and that the adoption of the plan brought Topeka "into full compliance with the law." *Id.*

The fourth step of the plan was opposed by the president of the NAACP, Mr. Burnette. Mr. Burnette told the board that the NAACP only took legal action in this case as a "last resort." Rec. ex. vol. IV at 120. He opposed the plan because "it would take seven long years to terminate racial segregation" and no steps had been taken to integrate black teachers. *Id.* at 120-21. The fourth step of the plan was approved in January 1956. *Id.* at 121. The plan had been implemented fully as of the 1960-61 school year, and by 1961-62, all elementary students, who had been permitted to continue at the school which they attended prior to implementation of step four of the plan, had completed their elementary education.

Two observations should be made at this point. First, the school board hardly can be faulted for implementing its plan to desegregate the elementary schools. In its revised opinion, the court has downgraded the school board's initial desegregation efforts from "a remarkably enlightened beginning in the mid-1950's," *see Brown v. Board of Educ.*, No. 87-1668 slip op. at 42 (filed Jul. 2, 1989 & withdrawn Jul. 19, 1989), to "a 'good faith' beginning", Court's Opinion at 52 [App. 58b] (quoting *Brown*, 139 F. Supp. at 470). This court then characterizes "[t]he mid-50s to mid-60s," as "no doubt" segregative under modern authority. Court's Opinion at 54-55 [App. 60-64b]. The board had the approval of the district court and federal authority well into the 1970's, including that of this circuit, which echoed the district court's conclusion that *Brown I* and *Brown II*, while prohibiting segregation, did not require concern with integrative racial balancing in neighborhood schools.[7] *See Keyes*

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[7] The court relies on *United States v. Board of Educ. (Tulsa I)*, 429 F.2d 1253 (10th Cir. 1970) (Lewis, C.J.) for the proposition that "when minorities are concentrated in certain areas of the city, neighborhood school plans may be wholly insufficient to fulfill the district's affirmative duty to eliminate the vestiges of segregation." Court's Opinion at 29 [App. 32b]. To the extent that the court implies that this circuit has premised constitutional liability on *de facto* segregation, the court is in error. In *Tulsa I*, the court required that neighborhood plans evolve "from racially neutral demographic and geographical considerations," and that the board adhere "solely to those stated considerations in implementing and updating the neighborhood policy." *Id.* at 1258. The Tulsa system failed both

(continued...)

v. School Dist. No. 1, 445 F.2d 990, 1005 (10th Cir. 1971) ("We never construed Brown to prohibit racially

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[7](...continued)
tests. The court first determined that enforcement of restrictive covenants and discriminatory housing practices were responsible for the concentration of blacks in north Tulsa. *Tulsa I* at 1255. In a clear attempt to circumvent *Brown I* and *Brown II*, the board drew boundaries for the 1955-56 school year which corresponded precisely with the previously segregated system. *Id.* at 1255-56. These "superimposed" attendance zones were designed to maintain racial segregation, and were hardly neutral. Moreover, the neighborhood system was inconsistent with its stated objectives. *Id.* at 1256, 1259.

In *United States v. Board of Educ. (Tulsa II)*, 459 F.2d 720 (10th Cir. 1972) (Lewis, C.J.), *vacated*, 413 U.S. 916 (1973), the court made it clear that it did not intend to change the rule in this circuit concerning neighborhood schools. The court cited *Tulsa I* and other Tenth Circuit cases for the following proposition:

> The law of this circuit has been consistently stated by the court to be that neighborhood school plans, when impartially maintained and administered, do not violate constitutional rights even though the result of such plans if racial imbalance.

Id. at 724. Of course, *Tulsa II* was vacated for reconsideration in light of the *Keyes* presumption which held that "a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." *Keyes*, 413 U.S. at 208. Racial imbalance in a neighborhood school plan does not in and of itself support a constitutional violation. Indeed, the Court has consistently refused to consider whether racial imbalance inherent in a neighborhood school policy will support a constitutional violation in the absence of a finding of current *de jure* segregation in some part of the school system. *Keyes*, 413 U.S. at 212; *Swann*, 402 U.S. at 23.

imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue."), *modified*, 413 U.S. 189 (1973); *Board of Educ. v. Dowell*, 375 F.2d 158, 166 (10th Cir.) ("It is still the rule in this Circuit and elsewhere that neighborhood school attendance policies, when impartially maintained and administered, do not violate any fundamental Constitutional principles or deprive certain classes of individuals of their Constitutional rights."), *cert. denied*, 387 U.S. 931 (1967); *Downs v. Board of Educ.*, 336 F.2d 988, 995-96, 998 (10th Cir. 1964) (neighborhood schools which may result in racial imbalance not actionable; no duty to integrate), *cert. denied*, 380 U.S. 914 (1965); *Bell v. School City of Gary*, 324 F.2d 209, 213 (7th Cir. 1963) (neighborhood school plan drawn with no intent or purpose to segregate is constitutional even if effect is that some schools will not be racially balanced), *cert. denied*, 377 U.S. 924 (1964). Second, courts do not speak unless spoken to and cannot decide what is not before them. Here, the school board made hundreds of decisions since 1952 that the plaintiffs contend reflect segregative intent and effect, yet not until 1979 was the court asked to intervene. While this in no way would excuse noncompliance with the constitutional command to desegregate the schools, it does furnish a backdrop against which to understand the liability focus of this case.

II.

The amplification of *Brown I* and *Brown II* began with the Court's decision in *Green*, 391 U.S. 430 (1968). The New Kent County, Virginia system was considerably smaller than the Topeka system, with an enrollment of 1300 students in two schools, approximately 57% black and 43% white. *Id.* at 432. The court considered a plan which allowed a student to choose between schools which were essentially one-race schools with respect to "faculty, staff, transportation, extracurricular activities and facilities." *Id.* at 435. In every way, the schools were a product of *de jure* segregation. Although students had a choice between schools, attendance patterns largely reflected the *de jure* system. *Id.* at 441. Eighty-five percent of the black children attended an all-black school. *Id.* at 441. The court made it clear that school boards operating state-compelled dual school systems at the time of *Brown II* "were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 437-38.

From 1955-1969, the Topeka school district underwent substantial transition. Due to annexation and unification between 1957 and 1964, the size of the

district more than doubled, increasing from 16.60 to 37.45 square miles, which "fundamentally changed the system." *See* rec. vol. XI at 2399 (commenting upon changes from 1955-60). The population in Topeka grew until 1970, and thereafter declined. Rec. vol. XI at 2292-93; ex. vol. I at 12. This trend was reflected in school enrollment which has declined substantially in recent years.[8] The black and hispanic population increased significantly. Rec. ex. vol. I at 12. And the Topeka school board continued with its responsibility to eliminate *de jure* segregation and its vestiges.

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[8] The total enrollment for all USD 501 programs has declined over the recent years. Enrollment for the 1985-86 school year was 41.6% less than the peak enrollment in 1969-70.

Total Enrollment U.S.D. 501

Year	Students	Year	Students	Year	Students
1953-54	11,977	1971-72	24,183	1979-80	16,875
1954-55	12,517	1972-73	23,060	1980-81	16,408
		1973-74	21,751	1981-82	15,960
1966-67	24,631	1974-75	20,596	1982-83	15,670
1967-68	25,255	1975-76	20,242	1983-84	15,264
1968-69	25,737	1976-77	19,293	1984-85	15,106
1969-70	25,847	1977-78	18,383	1985-86	15,103
1970-71	25,002	1978-79	17,480		

Rec. ex. vol. IV at 34, 36, 57, 61, 65, 69, 73, 77, 81, 85, 89, 92, 96, 100, 104, 108, 112, 133, 145, 157, 169, & 181.

In the 1955-56, school year, the board operated 23 elementary schools,[9] 7 junior high schools,[10] and 1

9

Racial Inventory of U.S.D. 501 Elementary Students
School Year 1955-56

School	Black	White	Total	% Black
Buchanan	88	0	88	100.0
Central Park	16	354	370	4.3
Clay	20	180	200	10.0
Crestview	0	687	687	0
Gage	0	645	645	0
Grant	75	296	371	20.2
Lafayette	47	314	361	13.0
Lincoln	73	438	511	14.3
Lowman Hill	46	242	288	15.9
Lundgren (Oakland)	0	436	436	0
Monroe	149	0	149	100.0
Parkdale	67	240	307	21.8
Polk	2	227	229	.9
Potwin	0	441	441	0
Quincy	34	407	441	7.7
Quinton Heights	23	308	331	6.9
Randolph	2	543	545	.4
State Street	27	504	531	5.1
Stout	0	263	263	0
Sumner	7	312	319	2.2
Van Buren	42	206	248	16.9
Washington	172	1	173	99.4
Whitson	8	716	724	1.1

(continued...)

high school. *Brown*, 671 F. Supp at 1293; rec. ex. vol. IV at 38; supp. vol. XI at 186, 225. At the time of *Brown I*, the Court recognized that Topeka did not operate *de jure* secondary schools. *Brown I*, 347 U.S. at 486 n.1. In the 1955-56 school year, black elementary students attended 18 out of 23 elementary schools. *Brown*, 671 F. Supp. at 1293. At the elementary school level, the total black student population was 10.4% and three schools were 90+% black (Buchanan, Monroe and Washington). *See supra* note 9. 45.6% of the black elementary students attended these three schools. *Id.* Thirteen elementary schools were 90+% white. *Id.* At the junior high school level, the total black student population was

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[9](...continued)

Total	898	7,760	8,658	10.4

Rec. ex. vol. IV at 39-40.

[10] Racial Inventory of U.S.D. Junior High Students
School Year 1955-1956

School	Black	White	Total	% Black
E. Topeka	136	313	449	30.3
Crane	75	292	367	20.4
Boswell	55	454	509	10.9
Curtis	35	235	270	12.9
Holliday	9	335	344	2.6
Roosevelt	9	491	500	1.7
Capper	1	407	408	0.2
Total	320	2,527	2,847	11.2

Rec. supp. vol. II at 186 (Lamson Report). This information also appears in supp. vol. XI at 186. Although Mr. Lamson's report appears in a pleading at supp. vol. II, I ordered supp. vol. XI, which is the report as admitted into evidence by the district court. Henceforth, I will refer to the report as contained in supp. vol. XI.

estimated to be 11.2%. *See supra* note 10. There were no 90+% black junior high schools, but 3 schools were 90+% white (Holliday, Roosevelt & Capper).

In the 1968-69 school year, the school board operated 34 elementary schools,[11] 11 junior high

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[11] Racial Inventory of USD 501 Elementary Students
School Year 1968-69

School	Minority	White	Total	% Minority
Avondale East	107	445	552	19.38
Avondale Southwest	14	457	471	2.97
Avondale West	7	568	575	1.22
Belvoir	294	224	518	56.76
Bishop	15	488	503	2.98
Central Park	65	298	363	17.91
Clay	46	180	226	20.35
Crestview	5	525	530	0.94
Gage	2	393	395	0.51
Grant	121	215	336	36.01
H. P. Central	140	533	673	20.80
H. P. North	145	368	513	28.27
H. P. South	37	570	607	6.10
Hudson	23	312	335	6.87
Lafayette	275	247	522	52.68
Linn	35	369	404	8.66
Lowman Hill	174	210	384	45.31
Lundgren	7	395	402	1.74
McCarter	3	548	551	0.54
McClure	3	493	496	0.60
McEachron	6	471	477	1.26
Monroe	172	58	230	74.78
Parkdale	377	38	415	90.84
Polk	30	174	204	14.71
Potwin	5	362	367	1.36
Quincy	61	313	374	16.31
Quinton Heights	103	192	295	34.92
Randolph	3	521	524	0.57
Rice	30	293	323	9.29
Sheldon	17	287	304	5.59

(continued...)

schools[12] and 3 high schools,[13] having added

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[11](...continued)

State Street	155	400	555	27.93
Stout	7	365	372	1.88
Sumner	38	248	286	13.29
Whitson	3	433	436	0.69
Total	2,525	11,993	14,518	17.39

Rec. ex. vol. IV at 62-63.

[12] Racial Inventory of USD 501 Junior High Students
School Year 1968-69

School	Minority	White	Total	% Minority
Boswell	85	490	575	14.78
Capper	2	565	567	0.35
Crane	133	201	334	39.82
Curtis	83	169	252	32.94
East Topeka	339	222	561	60.43
Eisenhower	47	476	523	8.99
Highland Park	111	444	555	20.00
Holliday	89	324	413	21.55
Jardine	12	896	908	1.32
Landon	7	500	507	1.38
Roosevelt	27	445	472	5.72
Total	935	4,732	5,667	16.50

Rec. ex. vol. IV at 64.

Highland Park High School in 1959 through annexation and Topeka West High School in 1961 through construction. Rec. ex. vol. IV at 64; supp. vol. XI at 225. The system had 25,737 students. Rec. ex. vol. IV at 65; *see supra* note 8. Three of the four initially *de jure* black elementary schools had been

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[13] Racial Inventory of USD 501 Senior High Students
School Year 1968-69

School	Minority	White	Total	% Minority
Highland Park	220	1,202	1,422	15.47
Topeka	584	1,480	2,064	28.29
Topeka West	10	1,552	1,562	0.64
Total	814	4,234	5,048	16.13

Rec. ex. vol. IV at 65.

closed by the 1968-69 school year. McKinley was closed in 1955, Buchanan in 1959, and Washington in 1962. *Brown*, 671 F. Supp. at 1293. Monroe, the only remaining *de jure* black elementary school (Monroe) had an enrollment which was 25% white. *Id.* At the elementary school level, the total minority[14] student population was 17.39% minority (12.40% black), and one school (Parkdale) was 90+% minority and three others were 50+% minority (Belvoir, Lafayette, Monroe). *See supra* note 11. Eighteen

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[14] The initial data concerning the 1955-56 school year only contained information about black and white enrollment. As noted in the court's opinion at 12 n.9 [App. 13b n.9], in years subsequent to 1966, the board began keeping data on whites and minorities more broadly defined. *See* rec. vol. IV at 432. Contrary to the court's assertion, however, it is far from clear that the "parties are in agreement that the difference between black and minority students is not significant." *Id.*; *see* rec. vol. IV at 562, 566 & 572. Minority students in 1985-86 number 3,919 (25.95%) of the 15,103 students. Of the minority amount, 2,784 (18.43%) are black; 758 (5.02%) are hispanic; 240 (1.59%) are American Indian; and 137 (.91%) are Asian America. Rec. ex. vol. IV at 181.

In *Dowell v. Board of Educ.*, No. 88-1067, slip op. at 7, 7 n.2, 22, 32, 44 (10th Cir. filed Oct. 6, 1989), this court declined to aggregate the number of minority students of different races for purposes of analyzing the racial composition of the Oklahoma City elementary schools. *See id.* dissent at 10-19 (Baldock, J., dissenting) (arguing that aggregation appropriate). The Supreme Court has indicated that minority groups should be treated together for the purpose of applying desegregation law. *See Keyes*, 413 U.S. at 195-98. Thus, the court's approach to aggregation in this case is consistent with Supreme Court authority, but inconsistent with our own precedent in *Dowell*.

elementary schools were 90+% white. *Id.* At the junior high school level, the total minority student population was 16.50% (11.81% black). *See supra* note 12. There were no 90+% black junior high schools, but five junior high schools were 90+% white (Capper, Eisenhower, Jardine, Landon & Roosevelt). *Id.* There were no 90+% black high schools, but one high school was 90+% white (Topeka West). *See supra* note 13. Minority students attended every school in the district, but in widely varying numbers. *See supra* notes 11-13.

In 1971, the Supreme Court provided greater guidance for the remedial phase of desegregation. *Swann*, 402 U.S. at 18. The Charlotte-Mecklenburg school system was considerably larger than the Topeka system, with an enrollment of more than 84,000 and 107 schools. *Id.* at 6. The racial composition was 71% white and 29% black. To support liability, the Supreme Court mentioned that two-thirds of 21,000 black students in Charlotte city schools attended 21 schools which were 99+% black. *Id.* at 7. The district court's objective was to have the schools approximate the racial composition of the system, 71% white and 29% black. *Id.* at 9-10 n.4. To that end, the district court endorsed a plan that called for busing to achieve schools 9% to 38% black. *Id.* at 9.

As a remedial phase case, *Swann* is important because it speaks "to what extent racial balance or racial quotas may be used as an implement in a

remedial order to correct a previously segregated system." *Id.* at 22. The school board argued that the district court erred by seeking racial balance in the 71%-29% range for each school. *Id.* at 23. The Court recognized that the district court's "use . . . of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement," and was within the district court's equitable discretion. *Id.* at 25.

The Court spoke to whether there is any constitutional requirement of racial balance.

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate the schools does not mean that every school in the community must always reflect the racial composition of the school system as a whole.

Id. at 24. This is of paramount importance for this case because, despite the court's citation of this principle, *see* Court's Opinion at 20, 85-86, 87 [App. 21-22b, 93b, 94-95b], the court has not allowed it to operate. Rather, even after the Topeka board has

implemented fully two desegregation plans and the system "improved dramatically in the last ten years as far as desegregation is concerned," Court's Opinion at 61 [App. 67b], the liability focus of the plaintiffs and the court is unmistakably on the principle that more could have been done to achieve greater *racial balance*, that is more schools could approach the system-wide minority average in student assignment. *See* Court's Opinion at 58-59, 62-64, 74-82 [App. 65-66b, 69-71b, 81-89b] (analyzing schools which plaintiffs suggest have "clear racial identities," *id.* at 74 [App. 81b], and essentially criticizing school board decisions which resulted in these schools not approximating the system-wide average of minority students). However, "the fact that a school board's desegregation plan leaves some disparity in racial balance among various schools in the system does not alone make that plan unacceptable." *Wright v. Council of the City of Emporia*, 407 U.S. 451, 464 (1972) (footnote omitted).

Equally important for this case is the Supreme Court's discussion in *Swann* of "whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation." *Swann*, 402 U.S. at 22. In a section entitled "One-Race Schools," the Court applied a common-sense approach to the problem of racial concentration in various parts of a metropolitan area.

> The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.
>
> In light of the above, it should be clear that the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools.

Id. at 25-26. When there has been intentional segregation in the past, there is a presumption against schools that are one-race minority or virtually one-race minority, and the school board has the burden of showing assignment is genuinely nondiscriminatory. *Id.* at 26; *Price* 694 F.2d at 353-56. The district court

recognized this presumption, although it noted that this case does not "fit the *Swann* presumption easily." *Brown*, 671 F. Supp. at 1295. Even though the proportion of minority students in this system is smaller than in many cases and there are *no* one-race minority or virtually one-race minority schools, the literal *Swann* presumption could be applied to the 90+% white schools. *See Price* 694 F.2d at 364-65.

This court acknowledges the critical importance of a finding of "one-race" schools to support a current condition of segregation and liability overall. Court's Opinion at 19-20 [App. 20-21b]. The court correctly notes that the significance of "one-race" white schools in this case is limited because of Topeka's large majority white student population (74.05% in 1985). *Id.* at 41-42 [App. 45-46b]; *see also Price*, 694 F.2d at 364-65 (recognizing major purpose behind school desegregation cases is to secure rights of minority groups; literal compliance with *Swann* may not be required when system is heavily white and all schools are majority white). But the court departs from *Swann* when it imposes liability on the basis of student assignment in the absence of "one-race" minority schools or a district court finding of current intentional segregation. This court imposes liability for a lack of racial balance, while virtually ignoring the demographic testimony of defendants' expert (and other evidence adduced by the defendants), which was credited by the

district court. *See* Court's Opinion at 41-42 n.52 [App. 46b n.52] ("In a school system with a 26% minority student population, we think the number of schools in Topeka that approach or are over the 50% minority mark constitute *persuasive* evidence that the school system has not met its duty to desegregate.") (emphasis added).

In 1973, the Supreme Court added an important presumption which expanded the consequences of a current condition of intentional segregation in any part of a school system. *Keyes*, 413 U.S. at 208. The district court in that case had found contemporary and intentional segregation, including student and teacher assignment, with respect to schools in the Park Hill area in Denver, which were attended by almost 38% of the black student population. *Id.* at 199. Blacks comprised 14% of the students in the system, hispanics comprised 20%; for a system minority population of 34%. *Id.* at 195. Three of five elementary schools in the Park Hill area were 89+% minority; one junior high was 76+% minority and the other was 96+% minority. *Id.* at 199 n.10. Near Park Hill were 22 core city schools, all 22 were 70+% minority and 11 were 90+% black. The district court and the court of appeals essentially required independent proof that the core city schools were a product of official segregation. *Id.* at 205. The Court stated:

> [W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Id. at 208. The Court emphasized that purpose or intent to segregate is what differentiates actionable *de jure* segregation from *de facto* segregation. *Id.* Thus, plaintiffs would be entitled to the *Keyes* presumption upon a showing of purposeful segregation in a meaningful part of the school system. *Id.* at 208-09. As noted, once the presumption is invoked, the defendant school board must come forward with evidence showing that "the existence of subsequent or other segregated schooling within the same system . . . is not also the result of intentionally segregative acts." *Keyes*, 413 U.S. at 210. The school board must either disprove segregative intent or show "that its past segregative acts did not create or contribute to the current segregated condition." *Id.* at 211.

The framework in *Keyes* formed the basis for the Court's decisions in *Columbus* and *Dayton II*. These cases held that if a school board was operating a dual school system in 1954, even absent a state provision so allowing, a plaintiff may satisfy his initial burden of proof by relying upon evidence of "*recent* and remote intentionally segregative actions" of the school board. *Columbus*, 443 U.S. at 463-65 (emphasis added); *see Dayton II*, 443 U.S. at 537. In both cases, the affirmative duty to eradicate the effects of past segregative conduct not only had been unfulfilled, but also segregative practices persisted. *Columbus*, 443 U.S. at 460-63; *Dayton II*, 443 U.S. at 537. Either type of violation would satisfy the intent requirement under the fourteenth amendment; the basis for a system-wide remedy was "purposefully segregative practices with current segregative impact." *Columbus*, 443 U.S. at 466; *Dayton II*, 443 U.S. at 537-38.

This court questions the applicability of *Keyes* and *Columbus* because those cases involved initial determinations of liability concerning policy-based dual, rather than statutorily dual, school systems. *See* Court's Opinion at 25 [App. 26-27b]. The court explains that the presumption developed in *Keyes* is limited only "to establish[ing] initial *de jure* segregation in a case where no statutorily mandated segregation exists." Court's Opinion at 26 n.27 [App. 27-28b

n.27]; *see also Columbus*, 443 U.S. at 458 (using *Keyes* presumption to establish system-wide segregation in 1954); *Dayton II*, 443 U.S. at 535 (same). According to the court, a different presumption "applies . . . *after* either statutorily-mandated or policy-based *de jure* segregation has been established." Court's Opinion at 26 n.27 [App. 26-27b, n.27]. The court then cites *Dayton II* in a later discussion for support. Court's Opinion at 26 [App. 28b]. However, like *Columbus*, *Dayton II* involved an initial determination of system-wide liability in Ohio where statutorily mandated segregation ceased after 1888. 443 U.S. at 534-35, 537; *Columbus*, 443 U.S. at 455-56, 455 n.4. Segregation by official policy, not by statute, was at issue.

In both *Columbus* and *Dayton II*, the *Keyes* presumption was employed to decree a current system-wide remedy on the basis of recent and remote purposefully segregative action, including the failure to satisfy the affirmative duty to eliminate a dual system. *Columbus*, 443 U.S. at 467-68 (discussing use of *Keyes*); *Dayton II*, 443 U.S. at 537 (citing *Keyes*), 443 U.S. at 534, 541-42 (consequences of 1954 dual system and intentionally segregative effect of actions since 1954 furnished basis of liability). Thus, the Supreme Court not only affirmed lower court findings of *officially* dual school systems as of 1954, but also approved current system-wide remedies based upon the authority of *Keyes*. *Columbus*, 443 U.S. at 467-68.

III.

In 1973, an action was filed against U.S.D. 501 and various other governmental defendants principally alleging that children in east and north Topeka (with higher concentrations of minority students) received inferior educational opportunities and facilities as compared to children in west and south Topeka. *Johnson v. Whittier*, No. T-5430 (D. Kan. filed Sept. 10, 1973). The filing of *Johnson* led to an investigation in November and December of 1973, by the U.S. Department of Health, Education and Welfare (HEW) to determine whether U.S.D. 501 was in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Rec. ex. vol. II at 30.

In January 1974, HEW released its findings by letter. The findings of HEW are very similar to the plaintiffs' allegations in this case. Specifically, HEW determined four areas of non-compliance. First, HEW claimed that a "substantial number of . . . schools continue to operate with student racial compositions not consonant with a unitary plan of student assignment capable of fully desegregating [the] district." Rec. ex. vol. V at 13. HEW found that five elementary schools "have substantially disproportionate minority student compositions clearly the result of a former dual pattern of operation." *Id.* The schools and minority

percentages were: Monroe (73.98%), Lafayette (61.22%), Lowman Hill (49.08), Parkdale (91.81%) and Belvoir (71.90%). *Id.*; rec. ex. vol. II at 72. Second, optional attendance zones were criticized. In the "most extreme" (and only) case mentioned "students transferring from areas outside the Lafayette attendance area constitute approximately one-third of the minority enrollment." Rec. ex. vol. V at 13. Thus, HEW was concerned with transfers by minorities to schools with already high minority percentages. Third, HEW found that junior high school facilities in schools with higher minority percentages (Crane, 50.85%; Curtis, 28.90%; East Topeka, 63.32%; and Highland Park, 27.16%) generally were inferior to and older than the four schools with the lowest percentage of minority enrollment (French, 2.97%; Landon, 1.89%, Jardine, 2.13% and Capper, 1.23%). *Id.* at 13-14; rec. ex. vol. IV at 84 (1973-74 racial inventory). Fourth, HEW found that a larger percentage of minority students, as compared to white students, attended elementary schools with inadequate kindergarten rooms and smaller library media centers. Rec. ex. vol. V at 14; vol. X at 1435.

In February 1974, the board, while not admitting liability, directed its administrative staff to develop a plan for compliance which could include reassigning students, redefining attendance areas, closing schools and constructing new or modifying existing facilities. Rec. ex. vol. II at 72. The plan developed by the staff

was presented in April 1974, and called for changing the attendance areas of 22 schools and closing 7 schools. *Id.* A concerned parents group complained about the lack of parental involvement and sought to be involved in the development of any plan. *Id.* at 74. Unlike a federal court, a democratically elected school board is charged with listening to parental concerns. The plan prepared by the staff was not adopted. *Id.* at 80. Instead, the board unanimously rejected the plan as creating inconvenience and hardship while lowering the quality of education. *Id.* at 80, 82. The board resolved that the "District determine if inequality of education opportunities exist, and if so, take the remedial steps necessary to rectify the same, retaining the neighborhood school concept wherever possible." *Id.* at 80.

In June 1974, HEW initiated formal administrative proceedings to terminate federal funds for the district's alleged lack of compliance with Title VI. *See In re Topeka Unified School District No. 501*, HEW Docket No. S-79. In the Notice of Opportunity for Hearing, HEW's litigating position unfolded. Rec. ex. vol. V at 150-58. HEW alleged that Topeka never fully desegregated its elementary and junior high schools as required by *Brown I* and that there were a substantial number of schools that were "one-race, virtually one-race, or substantially disproportionate in student racial composition." *Id.* at 155 (¶¶ 12, 13). In addition to

alleging a dual system with respect to student assignment and facilities, HEW claimed that the school district "has continued to assign faculty in a manner which reinforces the racial identity of its substantially disproportionate and one-race schools." *Id.* at ¶ 14.

The board went to federal court and sought to enjoin HEW from holding the hearing and cutting off federal funds. The board took the position that the entire Topeka system was still under the 1955 order to comply with *Brown I*. *See Brown v. Board of Educ.*, 84 F.R.D. 383, 390-91 (D. Kan. 1979). The district judge agreed and concluded that the district court was the proper forum for resolving desegregation claims. *Id.* at 391. The board then developed a short-range facilities plan which resulted in the closing of two elementary schools (Clay, 25.35% minority percentage, and Monroe, 82.73%) and two junior high schools (Crane, 52.85%, and Curtis, 25.64%), all at the end of the 1974-75 school year. Rec. ex. vol. II at 90-92, 96; ex. vol IV. at 87-88; vol. X at 1436. Monroe Elementary was the last formerly *de jure* black school, and it was closed at the end of the 1974-75 school year. Rec. ex. vol. II at 84, 90. Ironically, the board hired Dr. Gordon Foster, assisted by Mr. Lamson, who presented alternate suggestions. These parties became the plaintiffs' lead expert witnesses in this case.

By May 1975, the board had adopted an affirmative action plan, and approved the creation of a

citizens' advisory committee and a specialized learning center to "be operated in a manner intended to encourage integration among minority and majority students." Rec. ex. vol. II at 94; ex. vol. IV at 3-8; vol. X at 1449-52. All of these programs are still in place, including the learning center which is known as the Topeka Adventure Center.[15] *See Brown*, 671 F. Supp. at 1309 (discussing Adventure Center).

In March 1976, a divided board adopted a long-range facilities plan, after sharing the proposal with and receiving input from the advisory committee and the community. Rec. ex. vol. II at 96, 99; vol. X at 1437. The plan was a major restructuring of the Topeka schools and it required five years for implementation due to budgetary limitations (cost of capital improvements) and to avoid a reduction in force. Rec. ex. vol. II at 97-98; rec. vol. X at 1454-55 (deputy superintendent Henson). The plan had three purposes: economic efficiency resulting in better conditions for students and staff alike, educational efficiency with respect to facilities and improvement of racial

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[15] The Adventure Center seeks to emulate adult society by combining students from five or six different schools from various parts of Topeka and assigning the students various jobs in a model economy. Rec. supp. vol. VII at 2109-10, 2144. In the Adventure Center, all students become productive members of society by holding various "salaried" jobs. *Id.* at 2110. Students in third grade spend two days a year at the Adventure Center; students in fifth grade spend two weeks, and all students participate. *Id.* at 2107.

composition in the schools. Rec. vol. X at 1439. Board member Stratton[16] noted that financial concerns were important because of declining enrollment--the district had lost almost one-quarter of its enrollment (6,000 students) in five years. Rec. ex. vol. II at 97. Board member Hurd noted the overwhelming support in the community for the neighborhood school concept. *Id.* at 98. The plan contemplated the construction of new schools, the closing of older facilities, and the redrawing of attendance boundaries, taking into consideration the anticipated effects on the racial composition of the schools. For our purposes, the principal components of the plan, which this court refers to as a "brief flurry of action," Court's Opinion at 53 [App. 59b], included: elimination of all remaining optional attendance areas; closure of five junior high schools (Boswell, Capper, East Topeka,

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[16] It is easy to criticize the performance of school board members, but far more difficult to be a school board member facing difficult choices. For example, in adopting the long-range facilities plan, Mr. Stratton said:

> It is very difficult to be able to satisfy all wishes of the patrons of the district. I think about all a Board Member can do is attempt to weigh the interests of each individual, not only the students or parents of a district but also other people that live in the city, taxpayers, perhaps those who are on limited incomes and try to arrive at a decision which is as acceptable as possible.

Rec. ex. vol. II at 97. Mr. Stratton testified on behalf of the school board in this trial. Rec. vol. XII at 2482.

Highland Park and Roosevelt); transfer of the ninth grade to the senior high schools in the 1980-81 school year, conversion of Central Park Elementary to a middle school and construction of a new middle school at the Holliday-State Street site; and the closure of six elementary schools (Central Park, Grant, Parkdale, Polk, Rice and Sheldon). Rec. ex. vol. II at 97-99, 100 (elimination of optional attendance zone at high schools); rec. vol. X at 1439-43 (discussion of middle school concept). In April, HEW officials came to Topeka for two days and discussed the long-range facilities plan, the capital improvements plan, the citizen's advisory group, the affirmative action plan and the Adventure Center. Rec. ex. vol. II at 101.

In September 1976, HEW moved to dismiss its administrative enforcement proceedings on the grounds that the school district had "adopted a plan to remedy the violations of Title VI . . . alleged in the Notice of Opportunity for hearing in this matter." *Id.* at 175. An order of dismissal without prejudice was entered. *Id.* at 173. In April 1979, HEW received a complaint from Richard Gellar, M.D., alleging that the district's proposed closing of Central Park Elementary (which was to be converted into Robinson Middle School) "could result in the segregated placement of students within the District on the basis of race." *Id.* at 181. Dr. Gellar than amended his complaint to allege that the implementation of a Long-Range Facilities Plan

"has resulted in increased segregation of students in schools since 1976." *Id.* at 184.

The Office of Civil Rights conducted an investigation and concluded that "there is not sufficient evidence to conclude that the District's pupil assignment practices implemented pursuant to the adoption of its Long Range Facilities Plan violate Title VI." *Id.* at 185. The Office found that the district was complying with the Long-Range Facility Plan and "reassigning students in a nondiscriminatory manner." *Id.* at 186. The Office also concluded that an open enrollment policy, which permitted students to attend a school other than their neighborhood school, "had not significantly affected the racial composition of its schools at this time," but continued monitoring was promised. *Id.* at 187. The concern was that open enrollment would contribute to increase minority enrollments at schools with high minority percentages. During the second year of the open enrollment policy, the board imposed a majority to minority limitation on the program which assured that transfers would only be approved if they enhanced racial balance. *See* rec. vol. XIII at 2700-01.

By the 1981-82 school year, the Long-Range Facilities Plan was implemented. Due to the conversion to middle schools, approximately 190 teachers were reassigned in 1980 "to achieve a distribution of minority staff members which will

comply with the requirements of the law." Rec. ex. vol. IV at 218. In 1981-82, the board operated 26 elementary schools, 6 middle schools, and 3 high school. *See infra* note 18. The administrative staff designed the Long-Range Plan to have an integrative effect as the district court apparently recognized, but this court ignores. Rec. vol. X at 1460-1461, XIII at 2719 (deputy superintendent Henson); *Brown* 671 F. Supp. at 1299-1300. For example, the junior high school areas formerly served by East Topeka (71.4% minority in 1979), were combined with those of Holliday and Curtis (lower minority percentages), to be served by Chase Middle School which opened in 1980 with 38.5% minority students. Rec. vol. IV at 106, 110, X at 1461, XIII at 2722. Rice Elementary (33.6% minority in 1980), which the district court noted had a desirable racial balance, 671 F. Supp. at 1299, was closed, but its attendance area was divided between Lafayette and Belvoir, thereby reducing the minority percentage in these schools. Rec. ex. vol. IV at 109; vol. X at 1461; vol. XIII at 2721. Lafayette went from 61.3% minority to 56%, while Belvoir went from 75.6% to 62.8% minority. Rec. ex. vol. IV at 109, 122. Likewise, the closing of Crane Junior High (52.9% minority in 1974) resulted in most of those students attending Boswell which increased minority students from 14.6% to 28.5%. *Id.* at 88, 91. Then Boswell (42.5% minority in 1979) was combined with

Roosevelt (19.5% minority in 1979), and all students were sent to the new Robinson Middle School which opened with 32.9% minority students. *Id.* at 106, 110; rec. vol. XIII at 2722-23. Moreover, this court points out that "the target minority percentages approved by HEW in 1976 have either been met or improved on." Court's Opinion at 62-63 n.76 [App. 69b n.76.[17]

With one exception resulting in the combination of two middle schools (Landon into French), the school boundaries for U.S.D. 501 remained constant from the 1981-82 school year until the end of the 1985-86 school year. Rec. vol. X at 1503-04. All schools remained open and the grade configurations remained the same. Thus, in analyzing whether there is a current condition of segregation, the district court had stable boundaries

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[17] The court points out that "HEW did not approve the projected enrollments of more than 70% minority for Lafayette or Belvoir." Court's Opinion at 62-63 n.76 [App. 69b n.76] (citing rec. ex. vol. II at 173) (letter from school board attorney to HEW summarizing proposed agreement between U.S.D. 501 and HEW). Under the plan, after the closure of Parkdale Elementary, Belvoir was expected to be 74.6% minority, while Lafayette was expected to be 70.7%. Rec. ex. vol. V at 37. The letter from the board's lawyer concerning the agreement between HEW and the board indicates that HEW was going to "express its concern that Lafayette and Belvoir Elementary Schools are expected to contain a disproportionate number of minority students" in a report to the district court. No such letter is contained in the record designated. Moreover, in 1985-86, Belvoir was 62.78% minority and Lafayette was 56.08% minority, well below the plan. Rec. ex. vol. IV at 170-71.

for a five-year period and could analyze data which was consistent (compiled in the same way) and comparable (measuring the same phenomenon). What is apparent is that the racial composition remained stable, and even became more integrated, given slightly increased minority enrollment.[18] *Brown*, 671 F. Supp. at 1298.

18

Racial Inventory of USD 501 Students
School Years 1985-86 compared with 1981-82

Elementary Schools 1985-86

School	Minority	White	Total	1985-86 % Min.	1981-82 % Minority
Avondale East	128	162	290	44.14	35.18
Avondale West	45	226	271	16.61	15.91
Belvoir	146	90	236	61.86	62.78
Bishop	36	306	342	10.53	10.18
Crestview	32	326	358	8.94	5.85
Gage	25	240	265	9.43	7.92
H. P. Central	140	259	399	35.09	35.58
H. P. North	179	130	309	57.93	60.90
H. P. South	110	283	393	27.99	29.98
Hudson	108	124	232	46.55	38.26
Lafayette	217	165	382	56.81	56.08
Linn	57	137	194	29.38	31.44
Lowman Hill	155	215	370	41.89	41.79
Lundgren	38	202	240	15.83	12.99
McCarter	35	347	382	9.16	9.20

(continued...)

[18](...continued)

McClure	23	296	319	7.21	3.23
McEachron	30	261	291	10.31	9.06
Potwin	18	215	233	7.73	5.16
Quincy	61	236	297	20.54	16.47
Quinton Heights	129	132	261	49.43	56.18
Randolph	64	368	432	14.81	10.87
Shaner	71	272	343	20.70	19.37
State Street	78	219	297	26.26	25.71
Stout	88	240	328	26.83	26.30
Sumner	90	196	286	31.47	36.36
Whitson	38	334	372	10.22	8.29
Elem. Total	2,141	5,981	8,122	26.36	25.22

Middle Schools 1985-86

School	Minority	White	Total	1985-86 % Min.	1981-82 % Minority
Chase	105	209	314	33.44	34.15
Eisenhower	218	230	448	48.66	45.71
French	16	241	257	6.23	5.49
Jardine	57	273	330	17.27	12.41
Landon	21	205	226	9.29	6.29
Robinson	115	288	403	28.54	33.18
Middle School Totals	532	1,446	1,978	26.90	25.05

(continued...)

Having discussed the two desegregation plans completely implemented by the board as the law developed, I now contrast the district court findings with this court's understanding of those findings. As an initial matter, it is useful to consider the scope of the school board's affirmative duty to desegregate and the scope of our review of the district court's findings.

A.

This court tells us that "[w]hat more can and should be done, if anything, is the final component in a determination of unitary status." Court's Opinion at 32 [App. 35b]. It is up to the school district to "demonstrate that it has done everything feasible." Topeka has implemented two desegregation plans, one court-ordered and one effectively imposed by the federal government. Apparently, this court does not

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[18](...continued)

Senior High Schools 1985-86

School	Minority	White	Total	1985-86 % Min.	1981-82 % Minority
Highland Park High	427	845	1,272	33.57	39.81
Topeka High	498	1,113	1,611	30.91	32.52
Topeka West	120	1,391	1,511	7.94	5.25
Senior High Totals	1,045	3,349	4,394	23.78	25.92

Rec. ex. vol. IV at 122-129, 170-177.

think that either plan counts for much, repeating in stentorian tone, that there is "no pattern to the changes over the years." Court's Opinion at 63-64 [App. 70b] (emphasis omitted). Past efforts do not conform to the court's vision of that which must be done. *See id.* at 63 [App. 69b] ("The school district has unquestionably had the opportunity to draw up and execute a scheme designed to lead to *comprehensive* desegregation.") (emphasis added). This court is unable to see the desegregative effect of many changes because it has strayed far beyond the purpose of desegregation law.

To comply with federal constitutional standards, the purpose of a desegregation plan, whether voluntary or decreed, is to eliminate an unconstitutional dual system and its vestiges arising from state-imposed segregation. *Swann*, 402 U.S. at 15, 28. A desegregation plan should be matched with the nature and scope of the constitutional violation. *Id.* at 16; *see also Pasadena*, 427 U.S. at 434; *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 738 (1974). The plan should be remedial, designed to restore the victims of discriminatory conduct to the position they would have been in had the discriminatory conduct not occurred. *Milliken I* at 746. And in evaluating the plan, the intrinsic value of state and local control of public education should be considered. *Dayton I*, 433 U.S. at 410. To those three ends, *Milliken II*, 433 U.S. at 280-81, a voluntary plan should accomplish the most desegregation feasible. Feasibility includes not only

geographic factors, but also funding and transportation factors. *Lee v. Anniston City School System*, 737 F.2 952, 957 (11th Cir. 1984). "The *effectiveness* of a remedy is the question and it makes no sense to construct decrees that do not grasp the real world." *United States v. Pittman*, 808 F.2d 385, 394 (5th Cir. 1987) (Higginbotham, J., concurring). Or, as stated by the First Circuit: "A realistic approach, moreover, serves the broader objective of ensuring that the courts do not intervene in school affairs any longer than is strictly necessary." *Morgan*, 831 F.2d at 324.

Thus, unitary or desegregated status does not mean that every school must approach the system-wide average of minority composition. As noted by the Fifth Circuit:

> The constitution does not require school districts to achieve maximum desegregation; that the plan does not result in the most desegregation possible does not mean that the plan is flawed constitutionally. "The constitutional command to desegregate the schools does not mean that every school in the community must always reflect the racial composition of the school system as a whole." [*Swann*, 402 U.S. at 24.]. "The school board's constitutional duty is to cure the continuing effects of the dual system, not

> to achieve an ideal racial balance." [*Lee v. Tuscaloosa City School System*, 576 F.2d 39, 41 (5th Cir. 1978).].

Monteilh v. St. Landry Parish School Bd., 848 F.2d 625, 632 (5th Cir. 1988) (footnotes omitted); *accord Morgan*, 831 F.2d at 325 ("Both the Supreme Court and this court have repeatedly stated that a judicially imposed desegregation remedy goes too far if it attempts to engineer some sort of idealized racial balance in the schools."); *Flax v. Potts*, 864 F.2d 1157, 1160 (5th Cir. 1989) ("There is no constitutional mandate that each school in the school district reflect the racial composition of the school district as a whole."); *Pitts v. Freeman*, 755 F.2d 1423, 1427 (11th Cir. 1985) ("We do not hold, however, that the defendants' affirmative duty compels then to adopt the most desegregative alternative available."); *Lee*, 737 F.2d 956-57.

When the constitutional violation is purposeful separation of the races caused by school officials in student and faculty/staff assignment, "[t]he mix that would have occurred but for the racism is a judicially created hypothetical." *United States v. Overton*, 834 F.2d 1171, 1176 (5th Cir. 1987). The remedy is to match the school system to a model of unitary or desegregated status. *Id.* at 1176-77. A major focus of this court's liability analysis is on schools which are

predominantly white due to residential migration to the western part of Topeka. But the dominant purpose of desegregation law is to remedy the racial discrimination against minority groups, discrimination which was ineluctably part of a *de jure* system. *See Price*, 694 F.2d at 364-65. Merely because some schools are largely white in this predominantly white system is not "per se offensive to the Constitution." *Valley v. Rapides Parish School Bd.*, 702 F.2d 1221, 1226 (5th Cir.), *cert. denied*, 464 U.S. 914 (1983). What would be offensive to the Constitution would be the retention of all-minority or virtually all-minority schools "where reasonable alternatives may be implemented." *Id.* (quoted in *Monteilh*, 848 F.2d at 633); *see*, *e.g.*, *United States v. Pittman*, 808 F.2d 385, 391 (5th Cir. 1987) (rejecting magnet school plan which did not eliminate 2 one-race black schools serving 40% of the black elementary students). Given the district court's findings, that condition is not present here because: 1) there are no all-minority or virtually all-minority schools in the system, and 2) those schools which have higher than average concentrations of minority students are not due to the effect of segregative actions by the defendants given the well-supported findings of the district court.

The court also indicates its concern with the few schools which have majority-minority or near majority-minority student enrollments, *see supra* note 18.

Court's Opinion at 41-42 n.52, 49-50 n.59 [App. 46b n.52, 55b n.59]. In a system which has achieved unitariness, a "no majority of any minority" requirement would be beyond what the Constitution requires. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434 (1976). But even in a system which has not been declared unitary, the lack of absolute racial balance which is not attributable to the school board is not tantamount to hindering the process of desegregation.

B.

Although this case involves constitutional claims of racial segregation by school officials, it is essential to keep in mind the proper division of functions between this court and the district court. *Dayton v. Board of Educ. (Dayton I)*, 433 U.S. 406, 410-11 (1977). The district court is charged with hearing the evidence and rendering findings of fact. Our task is to review those findings under the clearly erroneous standard, with due regard for the power which Congress has invested in the district courts to make such findings. *See* Fed. R. Civ. P. 52(a). "The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." *Anderson*, 470 U.S. at 573. Overstep, we have!

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless

clearly erroneous." Fed. R. Civ. P. 52(a). A finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the *entire* evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added). This standard is not a license to replace the district court's view of the evidence with that of the reviewing court; the reviewing court may not reverse merely because it would have viewed the evidence differently or "given greater weight to certain evidence." 5A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 52.03[1] (1989); *accord Inwood Laboratories, Inc. v. Ives Laboratories*, Inc., 456 U.S. 844, 855-58 (1982); *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 495-96 (1950). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Applying these standards, the district court should be affirmed. There is "great value" in relying on the factual findings of the district court. *Dayton II*, 443 U.S. at 534-35 n.8. The intent inquiry in school desegregation litigation almost always concerns objective numerical evidence that is circumstantial, in addition to testimonial evidence by school officials and other desegregation experts. Given the law, the intent inquiry in a desegregation case, including whether segregative intent from 1954 and beyond remains due

to non-compliance with the board's affirmative duty, "is an issue that can present very difficult and subtle factual questions." *See Columbus*, 443 U.S. at 470-71 (Stewart, J., concurring in result).

This court apparently views its initial inquiry, concerning a current condition of segregation, as largely numerical. But "where numbers alone are insufficient to define racially identifiable schools," the court invokes a broader form of racial identifiability which concerns "demography, geography, and the individual history of particular school and areas of the city," to virtually assure liability. *See* Court's Opinion at 17-18, 21 [App. 18-19b, 22b]. This approach is the one urged by plaintiffs' expert, Mr. Lamson. *See* rec. vol. III at 285-286, vol. IV at 459, 493-94, 522. While it is indisputable that racial identifiability *may* exist without reference to student assignment, and that faculty/staff assignment, facilities or extracurricular activities may result in a school being racially identifiable, see *Keyes*, 413 U.S. at 196 (citing *Keyes*, 313 F. Supp. at 74); *Swann*, 402 U.S. at 18, the court's expanded definition of racial identifiability is not supported by several of the cases it cites.[19]

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[19] Three of the four relevant cases cited by the court involve situations in which courts have looked beyond the number of one-race schools or other numerical indications of racial identifiability in student assignment, and have concluded that, due to other factors, there was not necessarily a constitutional violation. In *Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir. 1987), the court decided that out of 118 public schools in Boston, one 90+% school or thirteen 80+% schools (eight of which were 80+% black) would not preclude a

(continued...)

Court's Opinion at 21 n.25 [App. 22b n.25].

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[19](...continued)
finding of unitariness. In *Price*, 694 F.2d at 348, 350, the court decided that merely because a school had an enrollment less than 6.6% or greater than 17.6% black, it was not necessarily a racially identifiable school because racial identifiability is a question of fact, not of law. The court also recognized that the existence of "all-white or virtually all-white schools," in the various circumstances of ten previous Fifth Circuit cases, did not necessitate the finding of a constitutional violation. *Id.* at 365-66. In *Carr v. Montgomery County Bd. of Educ.*, 377 F. Supp. 1123, 1141 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975), the district court decided that a ±15% variation from the system-wide average, which would result in schools less than 33.5% or more than 63.5% black being "racially identifiable," was "highly artificial." *Id.* Certain schools which were "racially identifiable" under the formula were nonetheless approved. Thus, the factors the court cites, "demography, geography, and the individual history of particular schools and areas of the city," Court's Opinion at 21 [App. 22b], often have been used to narrow constitutional liability, not expand it.

This court also cites *United States v. Lawrence County School Dist.*, 799 F.2d 1031 (5th Cir. 1986), which appears to have decided as a matter of law that residential racial separation is generally a product of past segregated schools. *See id.* at 1043-44. This approach was criticized by Judge Higginbotham in his concurring and dissenting opinion in *Lawrence*. *Id.* at 1052-1060 (Higginbotham, J., concurring and dissenting).

"Where numbers alone are insufficient to define racially identifiable schools," Court's Opinion at 21 [App. 22b], there probably is not constitutional liability when it comes to student assignment. But, the court's opinion seems to say that, even in the absence of one-race schools or schools which are "racially identifiable" given some numerical standard, there still may be an unlawful condition of segregation given "demography, geography and the individual history of particular schools and areas of the city." *Id.*

The court justifies its *de novo* review of the numerical data as follows:

> As a general matter, it is important to note that much of the record evidence consists of statistics and other undisputed facts. Our differences with the district court lie mainly in how the essentially undisputed facts are assessed in light of the school district's mandate to dismantle the segregated school system. We believe that the district court's finding of unitariness is flawed by the undue deference it gave to the school district's neighborhood school policy and the court's failure to give the proper weight to its own findings that certain actions and omissions by the school district had a segregative effect.

Id. at 40 [App. 44b] (footnotes omitted). The court then makes the rather incredible statement that, in

reaching its decision, "we did not rely upon the experts' opinions." *Id.* at 40 n.50 [App. 44b n.50]; *compare id.* at 41-42 n.52 [App. 46b n.52] ("In a school district with a 26% minority student population, we think the number of schools in Topeka that approach or are over the 50% minority mark constitute persuasive evidence that the school system has not met its duty to desegregate.") *with* rec. vol. V at 622-23 (Dr. Foster's citing the presence of 3 elementary schools which are over 50% minority and 4 which are over 42% minority when asked his opinion of whether vestiges of the former dual school system exist).

The court contends that its disagreement with the district court merely concerns assessment of "essentially undisputed" facts, *id.* at 40 [App. 44b], and of "basically uncontroverted evidence," *id.* at 40 n.50 [App. 44b n.50]; however, in no way can it be said that the implications of the numerical data in this case were uncontested. Indeed, the month-long trial of this case belies that notion. Moreover, the characterization of the numerical data is inherently the province of the district court.

In 1985, the Supreme Court settled that the clearly erroneous standard applies "even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts." *Anderson*, 470 U.S. at 574. In 1985, Rule 52 also was amended to encompass documentary evidence. The

Advisory Committee addressed and rejected considerations offered in support of the view that it was not necessary to give special deference to factual determinations based on documentary evidence as opposed to credibility determinations:

> These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

Advisory Committee on Civil Rules, *Proposed Amendments to the Rules of Federal Civil Procedure*, 105 F.R.D. 218, 223 (1984). There are sound policy reasons for adhering to the clearly erroneous rule in all cases, whether documentary or testimonial evidence is involved.

C.

Another reason given for this court's rejection of the district court's factual findings is that it gave "undue deference" to the school district's neighborhood school policy. Court's Opinion at 40 [App. 44b]. A neighborhood school policy is not, in and of itself, violative of the fourteenth amendment. *Crawford v. Board of Educ.*, 458 U.S. 527, 537 n.15 (1982). Just as equal educational opportunity is a national policy, so too is neighborhood schooling. *See* 20 U.S.C. § 1701. There are significant advantages to neighborhood schooling, such as students walking to school, the absence of long bus rides, easier participation in extracurricular activities and possibly greater parental involvement. Of course, the advantages of neighborhood schools cannot outweigh the school board's duty to comply with the Constitution and "dismantle the dual school system." *Swann*, 402 U.S. at 28. To that end, this court has insisted that a neighborhood school plan be "impartially maintained and administered," and "not used as a mask to further and perpetuate racial discrimination." *Dowell*, 375 F.2d at 166.

The Supreme Court has spoken in the *remedial* phase of school desegregation litigation concerning neighborhood school plans:

Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.

No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits. The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-

> discriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral.

Swann, 402 U.S. at 28. As the above passage makes clear, it is a present constitutional violation which empowers a federal court to depart from a neighborhood school plan in favor of some other form of assignment in order to dismantle a dual school system. *See Davis v. Board of School Commr's*, 402 U.S. 33, 37 (1971) (remedy dependent on having found a violation). If the dual school system has been dismantled and there is no constitutional violation, neighborhood school policy is constitutionally permissible.

In the liability phase of this case, it was entirely appropriate for the district court to consider whether the school district had maintained and administered its neighborhood school policy in a neutral fashion, *particularly because the district court found that "the effects of school segregation on residential choice, if any, are not cognizable today." Brown*, 671 F. Supp. at 1297 (emphasis added). There are other reasons to reject the court's criticism of the district court's findings on this point. *See* Court's Opinion at 36-37, 37 n.48 [App. 39-40b, 40b n.48]. First, the district court was compelled to make its findings that the board maintained its neighborhood school policy in a race-

neutral fashion because the major part of the plaintiffs' case was devoted to proving otherwise. *See*, *e.g.*, rec. vol. II at 23-26; vol. X at 1418; supp. vol. XI at 241 (summaries of Mr. Lamson's findings). That is crystal clear on this 3,000 page plus record. The district court found that the neighborhood boundaries were not gerrymandered. *Brown*, 671 F. Supp. at 1301. Second, a fair reading of the district court's opinion in this case makes it evident that the district court was well aware of its responsibility to look beyond direct evidence concerning the intent of the school board, and also consider a foreseeability test in deciding whether the school board had failed to dismantle the dual system. The district court looked beyond the neighborhood school plan for segregative effect, thoroughly analyzing quantitative measures of racial composition.

D.

Another reason the court gives for rejecting the district court's factual findings is that this court would weigh the evidence differently. Court's Opinion at 40 [App. 44b] (discussing "court's failure to give proper weight to its own findings that certain actions and omissions by the school district had a segregative effect" and citing *Diaz v. San Jose Unified School Dist.*, 733 F.2d 660 (9th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1065 (1985), for an analogous

proposition about clearly erroneous district court findings concerning segregative intent). Regrettably, this court does not give a fair recitation of the district court findings. We are told: "The district court made the following findings:

(1) **that the neighborhood school attendance boundaries drawn in 1955 had the effect of maintaining segregation.**" Court's Opinion at 36 [App. 39b] (emphasis added). What the district court said was:

> A review of the school boundaries as they have developed over thirty years does not reveal a segregative pattern that remains today. The boundaries set around the former *de jure* black elementary schools after this case was remanded by the Supreme Court appear to have perpetuated the racial identity of those schools. But, the schools have long been closed and the segregative effects of those boundaries have attenuated entirely.

Brown, 671 F. Supp. at 1300. It was not clearly erroneous for the district court to find that 1955 boundaries for closed schools do not figure large into the current situation, over 30 years later. Though a court must look closely and carefully, conduct which resulted in segregative effect thirty years ago may indeed be so attenuated as to be insufficient to support a finding of intentional segregation caused by the school

board. *Keyes*, 413 U.S. at 211; *Higgins v. Board of Educ.*, 508 F.2d 779, 792 (6th Cir. 1974). Moreover, this finding demonstrates that the district court did consider the *effect* of school board action or inaction.

(2) **"that the construction of new school since that time had the effect of 'promot[ing] racial separation;'"** Court's Opinion at 36 [App. 39b] (emphasis added).

The district court said:

> "Although, on its face, the construction of schools, particularly on the west side of the district, *appears* to have promoted racial separation, the court does not believe that the district's school construction policy was intended to maintain or promote segregation. Most of the construction occurred during the peak years of student enrollment. More schools were needed. The location of the schools in areas of residential expansion was consistent with the race-neutral neighborhood school concept. There is no evidence that the students attending these schools could have been accommodated in the existing schools or that land was available in the older, more racially mixed areas of the district to build new schools.
>
> . . . .

> In sum, it *does not appear* that the district's school construction policy has promoted segregated residential patterns or segregated schools.

Brown, 671 F. Supp. at 1300 (emphasis added). This is a key finding, because with it, the trial court rejected Mr. Lamson's theory that the school board could have sent students to inner city schools with higher minority concentrations that were underutilized, rather than construct new facilities in areas that were expanding and predominantly white. *See*, *e.g.*, rec. vol. II at 150-51, 179; III at 268-73, 311-14, 334-36; supp. vol. XI at 40-49. Contrary to this court's opinion,the trial court *did not find* that school construction since 1955 promoted racial separation.

(3) **"that the reassignment of students from previous *de jure* schools to adjacent schools with higher-than-average percentages of minority students had the effect of increasing those percentages;"** Court's Opinion at 36 [App. 39b] (emphasis added). The district court discussed only one situation involving a *de jure* school on the page cited by this court, namely the transfer of Monroe students to Quinton Heights elementary school. *See* 671 F. Supp. at 1301. Monroe was closed at the end of the 1974-75 school year because at the beginning of that school year it only had

102 students. Rec. ex. vol. IV at 84, 90. Students were reassigned to Polk, Highland Park North and Quinton Heights. Rec. supp. vol. XI at 173. The minority percentage at Quinton Heights went from 37% (84 out of 227) in 1974-75 to 39.09% (77 out of 197) in 1975-76. Rec. ex. vol. IV at 87, 94. Thus, after Monroe closed, 7 fewer minority students attended Quinton Heights even after the Monroe students were added. Given that the percentage increase (2.09%) of minority enrollment was so small and was accompanied by a decrease in the absolute number of minority enrollment, it is hard to fault the district court for finding that the school district did not act improperly when it sent Monroe students to three neighborhood schools, including Quinton Heights.

(4) **"and that the assignment of faculty had the effect of placing minority faculty disproportionately at schools with higher-than-average minority student percentages."** Court's Opinion at 36 [App. 39-40b] (emphasis added).

The district court said:

> Plaintiffs' major contention with regard to faculty and staff is that the assignment of faculty and staff has served to racially identify the schools in the district.
>
> . . . .
>
> Examining the school system as a whole, despite the tendency to have more

> minority staff in schools with a greater than average minority student population, the court does not believe the district's assignment policies serve to identify schools as intended for white or black students. The pattern identified by plaintiffs is not monolithic. The current percentages of minority staff in the district's schools are generally within ranges acceptable to other courts in desegregation litigation. Other facets of faculty and staff policies are nondiscriminatory. In sum, the record before the court with regard to the district's approach to faculty and staff is not indicative of a dual system of education.

Id. at 1304-05. As discussed below, the faculty/staff assignment pattern in this case was almost within the range set by plaintiffs' own expert, Dr. Foster, for the one year in which substantially complete data was available to him. *See infra* note 31 and accompanying text. The district court's finding that the faculty/staff assignment was not indicative of a current condition of segregation is supported by the record, particularly considering the assignment figures from the 1986-87 year.

Continuing with its description of the lower court findings, this court concludes that (5) **"the school district's use of space additions,** [(6)] **its siting of Topeka West high school,** [(7)] **its drawing of**

attendance boundaries, and [(8)] **its failure to adopt various reorganization plans did not further the process of desegregation."** Court's Opinion at 36-37 [App. 40b] (emphasis added) (citing *Brown* 621 F. Supp. at 1298-1301, 1308-09). That is only true if desegregation is viewed as replicating the system-wide minority average in every school, in addition to eliminating a *de jure* system and its vestiges. The emphasis of the plaintiffs' case was on the alleged segregative intent and effect of school board actions and the board's inattention to racial balance. The board came forward with legitimate, non-discriminatory reasons (strong enough to disprove segregative intent) for many of its actions and attributed the racial composition of several schools to demographic forces. More importantly, the school board was able to convince the district court that there was not a current condition of segregation in Topeka, something which is amply supported by the record and not refuted by this court's opinion.

Contrary to the study by the plaintiffs' expert, the district court found that space additions were not "intentionally used to promote segregation or that schools are racially imbalanced today because of space additions." *Brown*, 671 F. Supp. at 1299.

As for the siting of Topeka West high school, it must be remembered that Topeka never had a dual system of education at the high school level. The site for Topeka West was acquired in the early or mid-50's

from a single family because it was big (40 acres) and well-located. Rec. vol. X at 1433, 1506-07. The district court found that the construction of Topeka West was a logical response to the overcrowding of Topeka High and the rapid population growth which was occurring in the western part of the district. *Brown*, 671 F. Supp. at 1300; *see also* rec. ex. vol. I at 14 (building patterns indicating that over half of new housing built in Topeka from 1950-70 was in the west area); rec. vol. X at 1432-33 (Topeka High School was overcrowded; Topeka West was built, without a planned athletic facility, only after a second bond election). Topeka doubled in population between 1955 and 1965. Rec. supp. vol. VII at 2094. Indeed, the enrollment at Topeka West was so great that some of the attendance area was transferred back to Topeka High School, furthering integration. Rec. vol. X at 1434. A site in west Topeka made sense because the newly annexed Highland Park High served the east part of the city, while Topeka High was centrally located. *Brown*, 671 F. Supp. at 1300; rec. ex. vol. I at 14. Moreover, the site was large enough to meet the school board's needs. Rec. vol. X at 1507.

Reorganization plans N and X, proposed in 1984, assumed that no school would have a minority enrollment of greater than 50%, and projections indicated that number would be reduced to 45%. Rec. ex. vol. V at 51; Brown, 671 F. Supp. at 1308-09. In

1985-86, three schools had majority-minority populations: Belvoir (61.86%); Lafayette (56.81%) and Highland Park North (57.93%). *Brown*, 671 F. Supp. at 1294. The district court was correct in finding that Plans N and X did not constitute a forgone opportunity to improve the racial composition of the schools. Indeed, the failure of Topeka to adopt Reorganization Plans N and X in 1984 should count for nothing in this case. *See* Court's Opinion at 60 n.75 [App. 67b n.75] (acknowledging opposition to plans). If there is one consistent theme in this record it is that the plans were expensive ($13 million for N; $15 million for X) and that they were opposed by every segment in Topeka. *See* rec. vol. XII (testimony of former board members) at 2451 (opposition came from every quadrant geographically, as well as every racial segment), 2452 (plans were expensive), 2467 (cost of plans), 2471-72 (plans would have closed many schools and created some very large schools), 2479 (no sector of community would support plans), 2481 (NAACP vigorously opposed plans); vol. XIII (testimony of deputy superintendent) at 2728 (community attached tremendous importance to neighborhood schools and opposed plans).

In determining that there is no current condition of segregation in Topeka, the district court carefully examined 18 factors: statistical measures of student population; student transfer policy; optional attendance zones; space additions; school closings; school

openings; school site locations; school boundary locations; history of the schools; facilities; extracurricular activities; curriculum; transportation; faculty and staff; community attitudes; equality of education; opportunities for desegregation; and other factors. The district court properly examined the traditional factors which bear on unitariness, in addition to those factors raised by plaintiffs which might have a bearing on unitariness. *Baliles*, 829 F.2d at 1312. Its findings in favor of the defendants in each area are supported by the record, and its ultimate finding of unitariness is likewise supported.

V.

This court's criticism of the district court is succinctly stated:

> The court evidently believed that if these two criteria, i.e., no intent to discriminate and consistency with a race-neutral neighborhood school plan, were met, the school district's actions would pass constitutional muster.
>
> . . . .
>
> While it did find that the school district had taken some actively desegregative actions, we are convinced that the court's overall conclusion on unitariness was fatally infected by the inadequacy of the burden of proof to which it held the school district.

Court's Opinion at 37, 39 [App. 40b, 43b]. The district court's attention to the neighborhood school plan already has been discussed in part. *See supra* p. 57-60 [App. 69-72c]. This court misses the mark if it is implying that intent is not relevant in this case. At a minimum, there must be a finding that the condition complained of is the *effect* of discriminatory intent, whether that discriminatory intent originated in 1954 or since. The district court made permissible inferences given the evidence. It determined that there was not a current condition of segregation and, therefore, the plaintiffs were not entitled to a presumption that the racial imbalance in the school system was a product of past segregative actions.

The whole of desegregation law is predicated upon a constitutional violation. "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). The Constitution does not employ a no-fault approach to liability when it comes to school board actions. Contrary to the court's opinion, intent is still relevant because it bears on causation. Only intentional state action which brings about or maintains segregation results in a constitutional violation. Columbus, 443 U.S. at 464. Even in a

system that once was dual, whether by statute or practice, "[d]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation. . . . [But] actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose." *Id.* Thus, a district court may consider a school board's adherence to a neighborhood school policy which may lead to racial imbalance, as one factor among many, in deciding "'whether an inference of segregative intent should be drawn.'" *Id.* at 465 (quoting *Penick v. Columbus Bd. of Educ.*, 429 F. Supp. 229, 255 (S.D. Ohio 1977), *aff'd in part and vacated in part*, 583 F.2d 787 (6th Cir. 1978), *aff'd*, 443 U.S. 449 (1979)). "The inference is permissive, not mandatory." *Higgins*, 508 F.2d at 793 ("While it is true that a court may *infer* such an intent [purposeful segregation] from the circumstances there is no authority for the proposition that such an intent *must* be inferred in all cases where segregated patterns exist in fact) (emphasis in original).

In *Dayton II*, the Court said:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the

> defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to defendants. Of course, as we hold in *Columbus* today, *ante* [443 U.S.], at 464-65, proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of purposefully discriminatory conduct.

Dayton II, 443 U.S. at 536 n.9. Merely because Topeka built and operated neighborhood schools that fall outside the statistical measures proposed by plaintiffs' experts does not mean that there is a current condition of segregation in Topeka. After two desegregation plans, this case is, at best, one of "foreseeability" based upon effect, although plaintiffs contended that they had shown more. *See, e.g.*, rec. vol. II at 23-26 (opening statement), III at 381 (plaintiff's expert cataloged effect of school board actions), IV at 449 (plaintiff's expert took "racial balance as your starting point," in proposing alternatives to board's administrative choices).

To be sure, "the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to

liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Dayton II*, 443 U.S. at 538; *Columbus*, 443 U.S. at 458-59; *Green*, 391 U.S. at 437-38. That, however, does not bar the district court from considering the school board's evidence that its actions have been effective in dismantling the dual system, that the current racial composition of the school system is not a product of discriminatory intent originating before *Brown I* and living on in effect to the present day. This court's opinion, by downplaying intent and causation, specifically the school board's evidence that segregative effects of past discriminatory intent no longer remain, has imposed liability based on the inferences it wishes to draw from certain objective evidence and testimony upon which reasonable people could differ as to interpretation. On the surface, this process may appear to have the advantage of simplicity and consistency. But the close evidence in this case was hardly simple and we are not allowed such consistency at the expense of district court findings which have support in the record.

The district court was well aware that quantitative data in school desegregation cases may be indicative of past or present segregative intent. *Brown*, 671 F. Supp. at 1295. It also was cognizant of the school board's affirmative duty to dismantle the dual system. *Id.* at 1292-93. Finally, the district court recognized

that it could draw an inference of segregative intent or an inference of the lack thereof, based upon the efficacy of the school board's desegregation efforts, including compliance with its affirmative duty:

> Evidence of segregative motive or the absence of such intent is relevant but not controlling in determining unitariness. "The measure of the post-Brown I conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." *Dayton II*, *supra*, 443 U.S. at 538, 99 S.Ct. at 2935.
>
> In sum, a unitary school system is one in which the characteristics of the 1954 dual system either do not exist or, if they exist, are not the result of past or present intentional segregative conduct of defendants or their predecessors.

Brown, 671 F. Supp. at 1293.

> The court shall examine many factors to decide whether illegal segregation exists in U.S.D. # 501. But, the statistical measures of racial makeup of the schools' student

> bodies are of prime importance. Often in school desegregation cases such statistics alone prove a pattern of discrimination.

Id. at 1295.

> If a district has consistently dragged its feet on desegregation, then the vestiges of the segregated system may remain.

Id. at 1308. Thus, I vehemently disagree with the court's conclusion that the district court incorrectly considered intent, while ignoring the board's affirmative duty.

The district court in this case discussed those factors which supported an inference of segregative intent or non-compliance with the affirmative duty to desegregate. It then explained why it rejected those inferences. *See Alexander v. Youngstown Bd. of Educ.*, 675 F.2d 787, 792-93 (6th Cir. 1982) (trial court may reject inferences of segregative intent). That critical discussion, however, is the departure for this court's reversal. *See* Court's Opinion at 36-37 [App.39-40b] (summarizing district court's findings). This court simply does not agree with the district court's declining to draw those inferences. Although this court claims that the district court did not properly evaluate the evidence for segregative effect, no fair reading of the

district court opinion would support that conclusion. The district court's exhaustive discussion of statistical racial identifiability and its implications, as well as its detailed treatment of each school alleged to be racially identifiable, belie this court's conclusion that the district court "failed adequately to weigh the conduct of the school district." *Id.* at 38 [App. 42b].

Perhaps the court has decided to dispense with the intent and causation inquiry because it seeks to ameliorate the effects of "subconscious racial discrimination." Court's Opinion at 32 [Sic 26A; App. 28b]. Indeed, the court's remark concerning "longstanding racism" carries with it an implication which is unwarranted. Court's Opinion at 32 [App. 35b] ("Courts must assess the school district's achievements with an eye to the possible and practical, but they must not let longstanding racism blur their ultimate focus on the ideal."). The court's explanation of the presumption it invokes, which I maintain is the same presumption discussed in *Keyes*, conforms with the tenor of the court's opinion:[20] "This presumption ensures that subconscious racial discrimination does not perpetuate the denial of equal protection to our nation's

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[20] "[A] finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious." *Keyes*, 413 U.S. at 208.

school children." Court's Opinion at 26A [App. 28-29b] (footnote omitted).

The court tells us that a presumption different than the one in *Keyes*, *see supra* note 20, applies in this case because the school district was operating a *de jure* system in 1954. Court's Opinion at 25-26, 26 n.27 [App. 27-28b, 27b n.27]. Reliance is placed on a footnote in *Keyes*, 413 U.S. at 211 n.17. That footnote is contained in a discussion of defenses the school board may raise to the prima facie case, including the defense that the effects of past segregative acts have been completely attenuated. The footnote explains that once the presumption is invoked, plaintiffs are not forced to prove non-attenuation because the burden shifts to the school board to prove attenuation. *Id.* Express language in *Keyes* makes it clear that the presumption is not limited only "to establish[ing] initial *de jure* segregation in a case where no statutorily mandated segregation exists." Court's Opinion at 26 n.27 [App. 27b n.27]. The *Keyes* Court stated:

> Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden

> of proving that this segregated schooling is not also the result of intentionally segregative acts.

413 U.S. at 210; *see also Columbus*, 443 U.S. at 457 n.5.

The reason for the presumption is that "'the prior doing of other similar acts, whether clearly part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent.'" *Keyes*, 413 U.S. at 207-08 (quoting 2 J. Wigmore, *Evidence* 200 (3d ed. 1940)). Thus, "a finding of illicit intent as to a meaningful portion of the item under question has substantial probative value on the question of illicit intent as to the remainder." *Keyes*, 413 U.S. at 207-08. The Supreme Court has yet to incorporate subconscious racial discrimination into the equal protection analysis.[21] While a finding of *de jure*

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[21] As support for the notion that unconscious racism is prevalent, the court cites Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 Stan. L. Rev. 317, 327 (1987). Court's Opinion at 26A n.28 [App. 29b n.28]. In that article, the author concludes that "[t]he intent requirement is a centerpiece in an ideology of equal opportunity that legitimizes the continued existence of racially and economically discriminatory conditions and rationalizes the superordinate status of privileged whites." *Id.* at 387. The author suggests that a "cultural meaning" test be incorporated into equal protection for the purpose of dealing with unconscious racism. *Id.* at 323-24, 355-81. Under the test, state action would be evaluated

(continued...)

segregation pursuant to statute in 1954 eases the plaintiffs' evidentiary burden, *Columbus*, 443 U.S. at 457 n.5, intent, whether proven by direct or circumstantial evidence, remains an essential element. This court apparently concedes as much, when in the context of its discussion of the burden of proof and unitariness states:

> Finally, objective proof of the school district's *intent* must be considered. How a district lobbies its patrons and government agencies on issues that affect desegregation, whether it seeks and heeds the desegregation

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[21](...continued)

> to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors: The actors are themselves part of the culture and presumably could not have acted without being influenced by racial considerations, even if they are unaware of their racist beliefs. Therefore, the court would apply strict scrutiny.

Id. at 324; *see also id.* at 355-56. The author does discuss the lack of judicial restraint such a proposal involves, but is not dissuaded: "In short, it would not be a bad thing for judges to base constitutional decisions on their own sense of what values best reflect our cultural tradition, so long as the conflicting perspectives competing to define those values are made explicit." *Id.* at 386; *see also id.* at 381-87.

> recommendations of others, and the cooperativeness of the district in complying with court orders, for example, bear on the manner in which the district has shaped current conditions in the school district.

Court's Opinion at 31-32 [App. 34-35b] (emphasis added and footnotes omitted). Several cases, including one of our own, also have considered good faith of the school district in deciding unitariness. *Dowell v. Board of Educ.*, No. 88-1067, slip. op. at 37 (10th Cir. Oct. 6, 1989); *Morgan*, 831 F.2d at 321; *Ross*, 699 F.2d at 226. Good faith speaks to intent and causation and making such inquiries is inconsistent with claiming that intent is irrelevant.

The court comments that: "A focus on provable intent alone would deny a remedy to too many Americans." Court's Opinion at 26A [App. 29b]. While this may be true once there has been a finding of a current condition of segregation in a meaningful portion of a school system with a relevant history of segregation by law, *see Keyes*, 413 U.S. at 210, such a finding should be a prerequisite to invoke the presumption discussed in *Keyes* and insure that any resultant system-wide desegregation order is linked to past or present racial discrimination. What the court has done in this case is to substitute its judgment for that of the district court concerning the degree of

imbalance necessary to invoke and sustain the presumption. Nowhere is this more evident than in the court's discussion of whether there is a current condition of segregation with respect to student and faculty/staff assignment in the Topeka schools.

VI.

It is clear that to sustain the presumption, the plaintiffs were required to prove "a current condition of segregation from intentional state action" with respect to "a meaningful portion of [the] school system."[22] *Keyes*, 413 U.S. at 205, 208. "Significant racial imbalance" in schools *may* operate as a "signal" to shift burden of proof, but even that "is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy." *Milliken v. Bradley (Milliken I)*, 418 U.S. 717, 741 n.19 (1974). Turning first to student assignment, what the court has done is to decide that if certain schools do not fall

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[22] This court evidences some confusion concerning the meaning of a "current condition of segregation," when it tells us that "[t]he case law is decidedly unclear as to the precise meaning of the term." Court's Opinion at 17-18 [App. 18b] (footnote omitted). In its explanatory footnote, this court does not cite *Keyes*, 413 U.S. at 205-06, from which the phrase originated. In *Keyes*, the Court explained that one of the elements of *de jure* segregation was "a current condition of segregation resulting from intentional state action." *Id.*

within certain percentages of minority enrollment, say 11% to 41% or even 10% to 60%, those schools are racially identifiable and indicative of a current condition of segregation resulting from the prior *de jure* system. Court's Opinion at 42-44 [App. 47-49b].

A.

Plaintiffs' expert Mr. Lamson testified that a school was racially identifiable as black if it had more than twice the system-wide average of black students. Rec. vol. III at 365. In 1985-86, the black student percentage was 18.4%, so a school with than more than 36.8% black students would have been racially identifiable. On the other hand, a school was racially identifiable white if it had less than one-half the system-wide average of black students. *Id.* Thus, a school would have been racially identifiable white if it had less than 9.2% black students. Moreover, under Mr. Lamson's view of racial identifiability, a school which had the system-wide average of black students still might be racially identifiable and segregated if neighboring schools had a greater percentage of white students. Rec. vol. IV at 531-32. Thus, according to his view, in 1952-53, Belvoir was segregated when it

had 20.8%[23] black students and system-wide black percentage was 11%. *Id.* at 456-459. Likewise, in 1985-86, Robinson Middle School was racially disproportionate, according to Mr. Lamson, when it had 20.84% black students and the system-wide middle school black percentage was 19.01%. *Id.* at 486-88. Plaintiffs' expert Dr. Foster did not agree with Mr. Lamson that a school which had the system-wide minority average still could be racially identifiable. Rec. vol. V at 687-88.

Dr. Foster advocated using a measure of ±15% of the system-wide minority percentage to come up with racially identifiable schools, although he acknowledged using ±20% in other cases he had worked on. Rec. vol. IV at 549-51; vol. V at 705-710. When the system-wide minority percentage was below 15% or 10%, Dr. Foster used a sliding scale of ±10% or ±5%. Rec. vol. IV at 553-54, 575-78. The trial judge seems to have analyzed the plaintiffs' case in part with a ±15% standard. *Brown*, 671 F. Supp. at 1295-96; *see* rec. vol. V at 578. But he came to a very different ultimate finding than this court, which has attached far more significance to the measure: "[W]e believe it perfectly reasonable to use a ±15% deviation in

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[23] It appears that the correct figure was 14.8%, as indicated by the numbers from the Annual Report of the County Superintendent of Shawnee County, 1952-53. Rec. vol. IV at 460.

assessing whether the school system ever achieved unitariness." Court's Opinion at 43 n.54 [App. 48b n.54]. Using this standard, there were 15 racially identifiable elementary schools in 1985-86; 7 racially identifiable minority, 8 racially identifiable white. Rec. vol. V at 593, 711; supp. vol. XIII (pl. ex. 155D); *see* Court's Opinion at 49-50 n.59 [App. 55b n.59]. There were 4 racially identifiable secondary schools using the ±15% standard; 1 racially identifiable minority, 3 racially identifiable white. Rec. supp. vol. XIII (pl. ex. 155G); *see* Court's Opinion at 49-50 n.59 [App. 55b n.59].

The court discusses the testimony of defendant's expert, Dr. Armor, and gives the impression that Dr. Armor suggested a standard whereby a school would not be racially identifiable (segregated) if it contained minority students within a 10% to 60% range. Court's Opinion at 43, 50-51 [App. 48b, 56-57b]; *see also id.* at 81 [App. 87-88b] (court's discussion of "predominantly white schools."). The court then concludes, using this standard, that there are 9 schools which are racially identifiable. *Id.* at 44 [App. 49b]. Yet, Dr. Armor was critical of the concept of basing liability on quantitative measures of racial identifiability.[24]

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[24] Dr. Armor recognized that the concept of racial identifiability is one of racial balance. Rec. vol. XIII at 2567. So did the district court. *Brown,*

(continued...)

In the interest of completeness, this court should have summarized Dr. Armor's testimony concerning the implications of his "range of acceptability of 10-60%." *Id.* at 43 [App. 48b]. This court should have explained that Dr. Armor, under questioning from the court, offered his conclusion, based on three quantitative measures (his absolute standard, the dissimilarity index and the relative exposure index) that

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[24](...continued)
671 F. Supp. at 1294-95. Dr. Armor did not think deviating from some given numerical standard was an appropriate measure for liability, because the concept was developed for remedial purposes, and although "nearly one-race" schools may prompt initial inquiry, one must look at the causes. Rec. vol. XIII at 2566-67. One must then determine whether school board action or demographic changes or both resulted in the current situation. *Id.* at 2571. Beyond that, use of the concept, even in the remedial phase of school desegregation, is becoming less prevalent because an attempt to attain racial balance in every school, say within a ±15% tolerance, requires techniques, such as pairing and clustering of schools, that are dependent on cross-district busing. *Id.* at 2567-68. Mandatory busing, in turn, often leads to white flight--existing students moving out of the district or enroll in private schools and potential students not moving into the district. *Id.* at 2568-69. Dr. Armor noted that "the white flight problem has been so severe in most central city school districts that were pursuing integration that what we have had is resegregation and school districts that become predominantly minority because of the loss of the white population." *Id.* at 2569. He also commented that the racial balance standard is difficult to apply to districts with very small minority composition. *Id.* at 2569-70. Finally, Dr. Armor testified that measures of racial balance, because they emphasize sufficient weight to whether there is "a meaningful opportunity for contact among black and white students." *Id.* at 2570. "That kind of contact can be attained in a whole variety of different configurations other than a system that is strictly racially balanced." *Id.* at 2570-71.

the school board had met its affirmative duty under *Brown I* and had desegregated the elementary grades as to student assignment.[25] Rec. vol. XIII at 2641-42. Had the court done so, it would not have been able to attribute a finding of nine racially identifiable schools by student assignment which result in a current condition of segregation, to Dr. Armor. *See* Court's Opinion at 43-44, 50-51, 81 [App. 48-49b, 56-58b] (invoking Dr. Armor's approach to justify findings).

Dr. Armor did point out that under his 10-60% range, one elementary school (Belvoir; 61.86) exceeded it and five elementary schools fell below it (Crestview, 8.94%; Gage 9.43%; McCarter, 9.16%; McClure, 7.21%; Potwin 7.73%). Rec. vol. XIII at 2580; ex. vol. IV at 170-74. Applying this 10-60% range to the secondary schools, three schools were below (French, 6.23%; Landon, 9.29% [now closed]; Topeka West, 7.94%). *See* rec. ex. vol. IV at 175-76. However, Dr. Armor preceded and concluded his list with the caveat that merely being outside his range is not

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[25] Plaintiffs' counsel attempted to impeach Dr. Armor with deposition testimony indicating that he would not address compliance with the affirmative duty, rec. vol. XIII at 2643-48. In his responses, Dr. Armor explained how he came to the conclusion, *id.* at 2642-43, and explained three times why his deposition answers were not inconsistent with the scope of his trial testimony. *Id.* at 2646-2648. The district court chose to credit Dr. Armor's testimony. *See Brown* 671 F. Supp. at 1298 (finding high levels of integration based on dissimilarity index and exposure index).

necessarily indicative of a current condition of segregation. Rec. vol. XIII at 2579, 2580. This is in accord with plaintiffs' expert Dr. Foster who admitted that racially identifiable schools under his ±15% standard are not necessarily unlawfully segregated. Rec. vol. VI at 792-93. Dr. Armor testified as follows:

> What I have been talking about in terms of this standard or a definition of integrated school has been primarily from the social science conception of what would constitute, what we ought to define as an integrated school or a desegregated school. It doesn't necessarily mean that a school that falls outside that range is, is in violation of the [C]onstitution or is wrong or is improper. One has, in any liability analysis one has to add to that--even my standard one needs to add the analysis of why a school is 5 percent minority or 70 percent minority outside my ideal range because if it's not, if it's that way because of demographic factors, then I don't, I don't see necessarily a basis for why it has to be changed; but I would still hold that ideally or what you strive for ought to be schools within that range.

Rec. vol. XIII at 2579. The district court's finding that "students are not separated on the basis of race,"

Brown, 671 F. Supp. at 1298, is supported by Dr. Armor's testimony and the factual findings regarding the above schools contained in the balance of the district court's opinion. *Id.* at 1294, 1301-04.

Assuming, *arguendo*, that this court's interpretation of Dr. Armor's testimony concerning the 10-60% range had merit, I submit that it would be anomalous to find a current condition of segregation regarding student assignment based on only one elementary school (Belvoir) which exceeded the target minority percentage and just barely (by 1.86%). Regarding the 8 predominantly white schools mentioned by Dr. Armor, in a system with low minority percentages overall, it is not unexpected to find some schools which will have large percentages of white students. Court's Opinion at 41-42 [App. 45-46b]. More importantly, every single one of those predominantly white schools identified by Dr. Armor, with the exception of McCarter (which went from a 9.20% minority percentage to 9.16%), has increased the percentage of minority enrollment when the 1985-86 figures are compared to those in 1981-82. *See supra* note 18.

Moreover, the district court considered other measures of integration in deciding that unlawful segregation did not exist. *Brown*, 671 F. Supp. at 1298. Specifically, Dr. Armor testified concerning the dissimilarity index and the relative exposure index which are measures of system-wide integration. It is

passing strange for the court to all but dismiss the significance of these measures in its discussion of whether there is a current condition of segregation, yet report them[26] and rely upon them concerning the positive effects of the board's implementation of its second desegregation plan. Court's Opinion at 43-44 n.55 [App. 48-49b n.55] (rejecting measures because they would not identify a hypothetical all-black school), 57-58, 58 n.71 (relying on measures to indicate success of school district's desegregation efforts from 1975-81). The court's criticism of these measures, that "they say nothing about individual schools," Court's Opinion at 43-44 n.55 [App. 48-49b n.55], is really only partially correct because the formulas rely upon data concerning each individual school. Dr. Armor readily indicated that these indices are to be supplemented by looking at individual schools. Rec. vol XIII at 2655; *see also* Court's Opinion at 43-44 n. 55 [App. 48b]. And so the district court did.

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[26] Both the elementary and "all schools" values of these indices present a picture of steady improvement over the years, reflecting the greater integration in the Topeka schools. *See infra* note 29. Significantly, the values of the these indices have continued to improve even after 1981, when Topeka's second desegregation plan was implemented completely.

The dissimilarity index measures the departure of a school system from perfect racial balance.[27] *Id.* at 2581. If every school had the system-wide minority composition, there would be perfect racial balance and the index would have a value of zero. *Id.* On the other hand, if every school were completely segregated, the index value would be expressed as 1.0 (or 100).[28] *Id.* The relative exposure index measures the opportunity for interracial contact given the number of whites and minorities in the system. *Id.* at 2582. A value of zero indicates total interracial contact, whereas a value of 1.0 (or 100) indicates a total separation. *Id.* Thus, regarding either measure, a decreasing value reflects a desegregative effect. Dr. Armor preferred the exposure index because it is less a measure of racial balance. *Id.* at 2583.

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[27] For discussion of the formulas for the dissimilarity index and exposure index, see F. Welch & A. Light, *New Evidence on School Desegregation*--U.S. Comm'n on Civil Rights Clearinghouse Pub. No. 92, 37-39, 48 n.52 (1987); *see also Dowell v. Board of Educ.*, slip op. at 49-50 n.16 (10th Cir. Oct. 6, 1989) (Baldock, J., dissenting).

[28] Sometimes the indices are expressed as ranging from 0 to 1.0, other times, from 0 to 100. Rec. vol. XIII at 2582.

Dr. Armor calculated the dissimilarity index and relative exposure index for Topeka over time.[29] Regarding the elementary schools, he testified that from 1966 to 1985 both indices dropped significantly indicating that: 1) there has been a "very substantial decline in the level of segregation" over 20 years, and 2) this improvement came at a time when the percentage of minority students increased from less than

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Topeka Desegregation Indexes Based on Actual Enrollment Data
Selected Years

	1955	1966	1968	1975	1981	1985
PERCENT MINORITY						
Elementary	10.4	16.5	17.4	21.5	25.2	26.4
Junior High	0.0	15.3	16.5	20.2	25.1	26.9
High School	0.0	14.9	16.1	19.1	25.9	23.8
All Schools	10.4	15.9	16.9	20.6	25.4	25.7
DISSIMILARITY						
Elementary	62.1	62.0	57.7	51.6	40.8	36.6
Junior High	0.0	53.2	52.0	39.8	39.1	32.1
High School	0.0	34.4	36.8	32.8	34.7	30.1
All Schools	62.1	55.1	52.4	43.8	38.8	33.6
RELATIVE EXPOSURE						
Elementary	47.7	38.7	33.0	27.1	17.2	14.6
Junior High	0.0	26.1	24.4	18.8	12.9	11.2
High Schools	0.0	8.1	10.0	8.0	11.0	7.3
All Schools	47.7	30.9	26.7	20.8	14.7	12.1

Rec. ex. vol. II at 156-57.

20% (16.5%) to its present level of 26%, and 3) the 1985 value of approximately 15 in the exposure index suggests that a "very substantial degree of interracial contact" is occurring at the elementary level. *Id.* at 2587. Regarding the middle schools, he reported similar trends, though not quite as dramatic: declines in both indices, improvement during a time when the percentage of minority students rose from 15% to its present level of 26%, and "a very substantial degree of desegregation." *Id.* at 2587-88. As to the high schools, neither index shows appreciable change over time, although both indices have dropped slightly. *Id.* at 2588. The reason for this is that both indices started out quite low and it is difficult to get below 10 on the exposure index (1985 value for high schools was 7.3). *Id.* at 2588.

Dr. Armor reasoned that had Topeka done nothing concerning integration, it is very likely that the indices would have remained at their significantly higher 1966 levels. *Id.* at 2589-90. Contrary to this court's appellate factfinding, *see* Court's Opinion at 68-71 [App. 75-77b] (attendance boundaries) & 72-74 [App. 79-81b] (school closings), Dr. Armor testified that "the reason why desegregation has improved to this extent was a series of school closings and boundary changes" affecting predominantly minority or white schools. Rec. vol. XIII at 2590. Dr. Armor also testified that the system's transfer policies over the years had no

significant effects, either segregative or desegregative. *Id.* at 2598. The policies were neutral. *Id.* This evidence favorable to the defendants was corroborated by defendants' other expert, who considered what would have happened had school boundaries been held constant as of 1963.[30]

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[30] For the most part, this court has chosen to discount the final conclusion of Dr. Clark, the defendants' expert demographer. *See* Court's Opinion at 58-59 [App. 65b]. Dr. Clark analyzed the attendance boundary changes for the 11 elementary school attendance areas with the highest residential concentration of black residents (from 1963-64 through the 1985-86 school year). His findings certainly are relevant to this court's contention that various school board actions have resulted in segregative effects from which segregative intent could be inferred:

> The overall conclusion of this analysis of population growth, its geographic dispersal over time and the attendance boundary analysis is that the major force driving the system of change in the Topeka school system was the demographic process and not the changes in attendance areas. The changes in school enrollment were due to the changing growth rates of the white and black populations and to their geographic locations and not to the year to year attendance area shifts. Even the analysis of the optional zones in the earlier years had only minimal impact on the percent black in the attendance areas. Indeed focusing on the last dozen years the school district has made changes which have provided real evidence of desegregative or neutral impacts. Given the declining white population and the increasing black population, the imbalances which exist are the result of the demographic forces and not the result of boundary changes.

(continued...)

B.

The plaintiffs' experts disputed Dr. Armor's work, just as he disputed theirs. For example, plaintiffs' expert Dr. Crain testified concerning the limitations of these indices and that other cities had lower dissimilarity and exposure indices and that more could be done as evidenced by Plans N and X that were not adopted. Rec. vol. IX at 1270-73, 1282-84, 1287; *but see* F. Welch & A. Light, *New Evidence on School Desegregation*-U.S. Comm'n on Civil Rights Clearinghouse Pub. No. 92, 38 (1987) ("The fact that the dissimilarity index is useful in depicting changes within a district does not imply that it is useful in comparing districts."). Dr. Foster indicated that he used the dissimilarity index "to determine the progress made across the State of Florida in school desegregation from year to year when data are available," and explained that it was not used "on a school-to-school

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[30](...continued)

Rec. ex. vol. I at 45; *accord* vol. XI at 2338-39. Although plaintiffs contended that the study, by beginning with 1963-64 boundaries, did not take into account any segregative effects remaining in those boundaries, the point of the study was to identify the role of demographic transition. Rec. vol. XI at 2359.

basis." Rec. vol. IV at 556, vol. V at 686. In short, the experts disagreed concerning the proper approach and whether there was a current condition of segregation regarding student assignment.

For this reason, we need pay particular attention to the Supreme Court's conclusion in *Anderson* that a factual finding cannot be clearly erroneous when "there are two permissible views of the evidence," when credibility is at issue, and even when it is not. 470 U.S. at 574. We have noted:

> The *Anderson* Court justified this conclusion by asserting that "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574, 105 S. Ct. at 1512. Although even the trial judge may not always be confident that he "knows" what happened, he is in the best position to "determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not." *Id.* at 580, 105 S. Ct. at 1515.

Pitre v. Western Elec. Co., Inc., 843 F.2d at 1262, 1266 n.1 (10th Cir. 1988). If ever there were a case for application of these principles, this is the one.

For this case not only involves documentary evidence, it also involves credibility determinations. At one point, in consistently exercising his discretion to admit evidence that might bear upon the truth of the issues, the trial judge remarked: "Let me say, it is the duty of a court to listen to the experts on both sides, and decide which set of experts to believe. I think it is necessary that I hear everything I can hear on this subject." Rec. vol. IX at 1222. It does not surprise me that the trial judge exercised his prerogative to believe the defendants' experts.

Even on this cold record, it appears that the defendants' experts may have had a patina of believability that comes with acknowledging ambiguity (the evidence is rarely all one way), yet still supporting a position. *See* M. Chesler, J. Sanders & D. Kalmuss, *Social Science in Court--Mobilizing Experts in the School Desegregation Cases* 90-106 (1988). For example, defendants' expert Dr. Armor testified that the open enrollment plan which operated for two years and then was discontinued in 1980 had a slightly segregative effect. Rec. vol. XIII at 2624; *Brown*, 671 F. Supp. at 1298. Likewise, defendant's expert Dr. Clark testified that a boundary change for Parkdale between 1963-64 and 1966-67, which resulted in a

greater concentration of minority students "could be discussed in terms of having partly segregative effects, partly demographic effects." Rec. vol. XI at 2326; ex. vol. I at 43. The court notes this fact in its opinion, Court's Opinion at 55 [App. 61b], while completely ignoring the conclusion of defendants' expert which supports the district court's findings.

The plaintiffs put on must testimony concerning factual matters which the Supreme Court decided as a matter of law years ago, namely the educational and psychological harms of segregation. *Brown I*, 347 U.S. at 494-95. Plaintiffs' expert Dr. Crain testified that segregated schools are responsible for the following problems as they affect blacks who might attend such schools: 1) depressed performance on standard achievement tests, which cannot be remedied by compensatory education, 2) higher failure rates on minimum competency testing, 3) a propensity to attend black colleges, 4) a propensity to quit college, if a white college is selected, 5) lack of clear career aspirations, 6) employment discrimination, 7) discomfort with white supervisors, 8) more frequent job changes, 9) higher juvenile delinquency, 10) higher teenage pregnancy, 11) greater unhappiness at age 40, 12) a desire to live in an unintegrated area, 13) infrequent home ownership, and 14) greater discomfort around whites. Rec. vol. IX at 1231, 1237, 1243, 1251-52, 1254, 1255, 1257, 1259, 1260, 1261, 1262. Viewing the transcript, I do not think that this remarkable list, which Dr. Crain claimed was

applicable to Topeka based on his brief visit, *id.* at 1264-65, enhanced his credibility. Nor did his definition of a segregated system seem consistent with that term as commonly understood in desegregation cases. Dr. Crain testified that, in his view, a segregated system was "when you have that *perception* of unequal racial composition," because "the harmful effects are going to start occurring because the whole process of desegregation is going to start hitting." Rec. vol. IX at 1289. Finally, Dr. Crain was quite willing to criticize the work of defendants' expert Dr. Poggio, by equating a cognitive abilities test with the Kansas Minimum Competency Test, yet Dr. Crain clearly was unaware of the sequence of the tests and the characteristics of each--regarding the Kansas Minimum Competency test, he did not know its objectives, what it purports to measure, how the test was designed or whether the passing scores change from year to year. Rec. supp. vol. X at 2862-2871; supp. vol. IX at 2922-2931 (Dr. Poggio's refutation of Dr. Crain's criticisms). Without question, the trial court credited Dr. Poggio's analysis over that of Dr. Crain. *Brown*, 671 F. Supp. at 1307-08.

Plaintiffs' expert Mr. Lamson was similarly emphatic. He testified that his task was "to identify all of those instances where administrative action would have tended to affect the racial composition of the schools." Rec. vol. III at 363, *see also* vol. II at 105.

After looking at hundreds of physical and administrative decisions (construction, portable building use, attendance boundaries, optional attendance zones) that affect student assignment *for thirty years*, Mr. Lamson's conclusion is notable for its simplicity and its partiality:

> I can confidently state that I was unable to find one instance where any of those physical and administrative educational tools were used as a part of a purposeful and ongoing program of affirmative pupil desegregation at either the elementary, junior high or middle, or senior high school level.
>
> Quite to the contrary . . . all of those administrative tools were used in an ongoing manner to actively separate the Black and white elementary, junior high and middle, and senior high students of the Topeka school system wherever and whenever feasible.

Rec. supp. vol. XI at 240-41. Mr. Lamson's testimony proves a bit much. Analyzing the motivations and actions of multimembered public bodies over three decades is difficult at best, but concluding that the Topeka system underwent *no* desegregation 25 years after *Brown I* blinks reality. Common sense tells us that even a broken clock is right twice a day. Yet too

much of Mr. Lamson's methodology has found its way into this court's opinion, given the trial court's rejection of the proposed findings supporting it. This is especially true concerning the court's comments about optional attendance zones, attendance boundaries, and school openings and closings, Court's Opinion at 62-75 [App. 68-82b], because plaintiffs' other lead expert, Dr. Foster, did not do an independent analysis of these factors. Rec. vol. V at 693; vol. VI at 739.

C.

The court also has found a current condition of segregation pertaining to faculty and staff assignment. Court's Opinion at 45-47 [App. 49-53b]. The court's reasoning here is questionable because, after *rejecting* the plaintiffs' standard as "very narrow," *id.* at 45 n.56 [App. 50b n.56], the court then finds liability when, even under the plaintiffs' "very narrow" standard, all that would have been necessary to eliminate racial identifiability regarding certificated faculty would have been to exchange 13 pairs of faculty members in 1981-82. Rec. vol. V at 663-66. That is only 26 certificated faculty out of 911 then employed, or 2.85%.[31] *Id.*;

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[31] The court discusses this finding as part of larger discussion responding to an imaginary contention made at trial "that further desegregation is, in

(continued...)

rec. vol. VI at 773-774. Faculty members are not fungible; whether this could be accomplished depends upon being able to send 13 minority faculty members into different schools, and replacing them with 13 white faculty members, while making sure that all have the right teaching certificates. Rec. vol. V at 664-65.

We begin with the proposition that "principals, teachers, teacher-aides and other staff who work directly with children at a school" may not be assigned so that the racial composition of the staff will indicate that a school is intended for white or minority students.

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[31](...continued)
effect, not worth the trouble." Court's Opinion at 84 [App. 92b]. Defendants did elicit from Dr. Foster that the school district could be in statistical compliance with his faculty/staff standard by moving 26 certificated faculty in 1981-82, and in compliance with his ±15% standard for racial identifiability in student assignment for 1985-86 by moving 265 out of 8,122 (3.26%) elementary students to different schools and by moving 77 secondary students out of 6,372 (1.20%) to different schools. Rec. vol. VI at 773-74, 797-800. The point of this "illuminating exercise," Court's Opinion at 85 [App. 93b], was to show that even under the plaintiffs' strict standard, statistical racial identifiability was slight, and it was a close question as to statistical racial identifiability, given less strict standards. Moreover, mere statistical racial identifiability does not mean that there is unlawful segregation, especially on these numbers. That is why it was important for the district court to look beyond statistical racial identifiability, before deciding whether those schools so identified were indicative of a current condition of segregation.

Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211, 1217-18 (5th Cir.) (remedy phase), *rev'd on other grounds*, 396 U.S. 290 (1970). Even if the racial composition of a school could be identified by assignment of faculty, that factor, in and of itself, does not mean that the school system is dual with respect to student assignment. *Dayton II*, 443 U.S. at 536 n.9. While a school should not be racially identifiable by its faculty, *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 236 (1969), the racial composition of the faculty need not be equivalent to that of the student population, *Fort Bend Indep. School Dist. v. City of Stafford*, 651 F.2d 1133, 1138 (5th Cir. 1981). It is possible for a school district to be unitary with respect to student assignment, but not with respect to faculty/staff assignment. *Pasadena*, 427 U.S. at 436; *Morgan*, 831 F.2d at 318-19.

Topeka is not heavily populated, has not been growing and does not have a large minority population as a percentage of the total population.[32] This is

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[32]

Shawnee County, Kansas		City of Topeka, Kansas	
Year	Total Persons	Year	Total Persons

(continued...)

reflected in the data on minority employment, which has remained fairly constant over the last five years.[33]

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[33](...continued)

1986	160,800
1980	154,916

Population Characteristics
1984

Race	Percent
White	89.92
Black and other	10.08

1986	118,580
1980	118,690

Population Characteristics
1980

Race	Percent
White	86.17
Black	9.51
Am. Indian Eskimo & Aleut	1.05
Asian or Pac. Islander	.53
Hispanic	4.64

Source: *U.S. Bureau of the Census, County and City Data Book-A Statistical Abstract Supplement* 185, 650 (1988).

33

Racial Inventory
Employees

Year	Minority Professional Teaching Staff	Other Minority Employees	Total Employees	% Minority
1981-82	84	141	1,974	11.4
1982-83	108	116	1,933	11.6
1983-84	114	116	1,926	11.9
1984-85	120	121	1,938	12.4
1985-86	114	121	1,948	12.1

(continued...)

Dr. Foster indicated that faculty composition should approximate the minority percentage enrollment in a school system, something which has not occurred in Topeka.[34] Rec. vol. V at 656. Dr. Foster acknowledged, however, that one would have to look at the relevant labor pool, an analysis that was *not* performed here. *Id.* at 657-58; *see also Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 (1977). But, Dr. Foster did testify that the demand far exceeds the supply of minority faculty members and that he found no fault with the district's recruiting policies. Rec. vol. VI at 757-59.

Dr. Foster analyzed faculty staff assignment, "not as a raw figure of percentage points from the mean," e.g. ±15% or ±20% from the system-wide minority average, but instead "as a percentage of the mean minority," say ±15% of the mean minority percentage. Rec. vol. V at 646. For example, in 1985-86, the percentage of minority faculty staff at the elementary schools was 11.23%. Rec. ex. vol. IV at 261. 15% of 11.23% is 1.68%; thus, a school could vary by ±1.68% from the minority percentage of 11.23%. *Id.*;

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[33](...continued)

Rec. ex. vol. IV at 266-68.

[34] While the school system must observe its affirmative action policy, the students have no constitutional right to attend a school with any particular racial composition. *Quarles v. Oxford Mun. Separate School Dist.*, 868 F.2d 750, 756 (5th Cir. 1989); *Oliver v. Kalamazoo Bd. of Educ.*, 706 F.2d 757, 762 (6th Cir. 1983).

rec. vol. V at 650. This means that a school would be racially identifiable if it had more than 12.9% (11.23% plus 1.68%) or less than 9.6% (11.23% minus 1.68%) minority faculty/staff. *Id.* Applying this concept to the secondary schools which had a minority faculty staff percentage of 12.65%, a school would be racially identifiable if it had more than 14.6% (12.65% plus 1.90%) or less than 10.8% (12.65% minus 1.90%) minority faculty staff. Rec. ex. vol. IV at 262. Applying this very tight standard is based on the theory that the school district has greater control over faculty staff assignments and that, insofar as possible, we should "get every school just like every other." Rec. vol. V at 646, 650-51. Under this method, 22 out of 26 elementary schools are racially identifiable and 8 out of 9 secondary schools are racially identifiable. Rec. ex. vol. IV at 261-62.

This court has rejected Dr. Foster's standard. The court has also rejected the district court's approach which used a ±10% variation around the mean because in one year, 1975, the standard would not have classified elementary schools as racially identifiable even if they had no minority faculty and staff. Court's Opinion at 66 [App. 72b]; *see Brown*, 671 F. Supp. at 1305 (noting that in 1985 only six schools had minority staff percentages beyond ±10% of the district-wide average and that all schools have been within ±10% range in last 10 years). In fairness to the district court, the problem identified by this court with the ±10% standard would have occurred only for the first of the

ten years; in all other years, the district-wide elementary minority staff percentage exceeded 10%.[35] Moreover, it should be noted that in *Dowell*, Dr. Foster testified that he had "'no problem'" with a ±10% standard, however, the system-wide average of black faculty in the school district at issue (Oklahoma City) was 36.9%. *Dowell v. Board of Educ.*, slip op. at 79 (10th Cir. 1989) (Baldock, J., dissenting).

In finding its "distinct pattern of correlation," Court's Opinion at 66 [App. 73b], between minority enrollment and assignment of minority staff, the court

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35

Elementary Minority Staff Percentage

Year	Minority Staff	Total Staff	% Minority
1973-74	127	708	17.94
1974-75	116	933	12.43
1975-76	99	997	9.93
1976-77	94.6	589.7	16.04
1977-78	109.8	780.2	14.07
1978-79	92.1	745.6	12.35
1979-80	89.2	721.4	12.36
1980-81	90.5	706.5	12.81
1981-82	82.3	666.5	12.35
1982-83	76.10	678.65	11.21
1983-84	78.15	635.0	12.31
1984-85	75.40	662.10	11.39

Rec. ex. vol. IV at 238, 240, 242, 244, 246, 248, 250, 252, 254, 255, 257, 259, 261.

initially used an *ad hoc* approach which was difficult to apply objectively. In its revised opinion, the court has indicated that a school is racially identifiable as to faculty/staff assignment if it is racially identifiable minority as to student assignment, using a ±15% standard, and 17.3% or more of the faculty/staff at the school is minority. Court's Opinion at 49-50 n.59 [App. 55b n.59]. Likewise, a racially identifiable white school (using a ±15% standard) is racially identifiable as to student assignment if 5.6% or less of the faculty is minority. *Id.* Using this method, there are 14 out of 19 schools racially identifiable by faculty/staff assignment in 1985-86. This means that not all of the schools identified as racially identifiable by the court as to student assignment are racially identifiable as to faculty/staff assignment.

Racially Identifiable Schools by Student Assignment (±15% std.) (Asterisk * Indicates Racial Identifiability as to Faculty/Staff) Under the Court's Method

Elementary Schools (26)	1985-86 Minority Students	1985-86 Minority Faculty/ Staff	1986-87 Minority Faculty/ Staff
Belvoir	61.9	14.8	16.67
Highland Park North	57.9	19.2*	18.18
Lafayette	56.8	17.3*	14.81
Quinton Heights	49.4	21.6*	12.50
Avondale East	44.1	33.3*	18.18

Hudson	46.6	19.2*	15.38 7 r.i.
Lowman	41.9	25.4*	13.04 min.
Bishop	10.5	1.7*	5.56
McEachron	10.3	4.3*	5.26
Whitson	10.2	2.8*	7.69
Gage	9.4	4.8*	7.14
McCarter	9.2	10.9	9.09
Crestview	8.9	10.7	12.00
Potwin	7.7	14.1	7.69 8 r.i.
McClure	7.2	0.0*	5.00 white

Middle Schools (6)

Eisenhower	48.7	18.5*	15.56 min. 1 r.i.
Landon	9.3	9.6	closed 2 r.i.
French	6.2	5.6*	13.89 white

High Schools (3)

Topeka West	7.9	2.5*	5.88 white 1 r.i.

Id. at 45-47, n.59 & 60, 49-50 n.61 [App. 55b, n.59, 57b n.60, 57b n.61]; supp. vol. XIII (pl. ex. 155D &

155G); rec. ex. vol. IV at 122-29, 170-77, 261-62; rec. ex. vol. II at 160-61.

Although the court plainly has adopted a ±15% standard for analyzing racial identifiability as to student assignment, it is interesting to compare the schools that the court finds racially identifiable as to faculty/staff assignment with the schools identified (as to student assignment) using Dr. Armor's "most generous" method. *See* Court's Opinion at 44, 48-50, 65-67 [App. 49b, 53-56b, 72-74b]; *see also supra* p. 80 [App. 98-99c] (listing schools identified by Dr. Armor for further study). There are only four schools in common to both lists (Gage, McClure, French and Topeka West). All of these schools have increased minority student representation over the years and in 1986-87, had increased minority faculty and administrative personnel.

The court notes that the data concerning faculty and staff was not as complete as it might be, and the problem seems to be that a breakdown of minority teaching and managerial personnel for each school was not available. Rec. vol. V at 660. Dr. Foster was able to prepare a breakdown of the district by employment category which tends to refute some of the court's statements, however. Dr. Foster broke the data down into two areas overall. I suspect that the first group must be certificated.

Categories	1985-86 Minority Employees	Total Employees	%Minority Employees
District-wide Managerial	8	54	14.8
School-based Managerial	8	50	16.0
Elementary Classroom Teachers	42	373	11.3
Secondary Classroom Teachers	28	349	8.0
Other Teachers & Professional Staff	44	467	9.4
Subtotal	130	1,293	
Teacher Aides	37	195	19.0
Clerical/Secretarial	14	165	8.5
Skilled & Technical	10	83	12.0
Service Workers	43	212	20.3
Subtotal	104	655	
Total	235[36]	1,948	12.1

Rec. ex. vol. IV at 268. According to Dr. Foster, given the 12.1% minority average, minorities were slightly underrepresented as elementary classroom teachers and were considerably underrepresented as

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[36] Should be 234.

secondary classroom teachers and clerical/secretarial workers. Rec. vol. V at 662. The court tells us that "minorities are represented more heavily in staff positions than in faculty positions." Court's Opinion at 47 [App. 53b]. After comparing the percentages, the court then makes the statement that "[a]ny one [minority] faculty/staff person listed at any one school is thus more likely to be a teacher aide or service worker than a teacher." *Id.* Given the similarity in the absolute numbers of elementary and secondary minority teachers (70) and teacher aide and service workers (80) in the system, one does not have to be a statistician to realize the limited significance of this simplistic appellate finding. Still, that questionable finding is the springboard for the perhaps well-meaning, but very condescending, comment by the court that "because minority employees are more heavily represented as staff than as faculty, it is quite possible that the one minority faculty/staff person at McEachron, for instance, is a janitorial staff person or other service worker rather than a teacher or other professional role model." Court's Opinion at 66-67 [App. 73b]; *see also id.* at 61 [App. 67-68b].

In that same vein, the court remarks that the "practice of disproportionate assignments also reinforces the irrational notion that minority teachers are inferior and not fit to teach white children." Court's Opinion at 48-49 [App. 54b]. There simply is no evidence of that in the current Topeka system based on this record. No one disputes that it is important to

have white and minority students exposed to positive role models of different races, *see* rec. vol. VI at 761, but the court's remark is simply inflammatory. Indeed, in a colloquy between Dr. Foster and counsel for the school board, it was revealed that as late as 1971, representatives of the black community appeared before the board seeking "the assignment of black teachers as black role models in predominantly black schools." Rec. vol. VI at 762. Dr. Foster testified that "blacks consistently across the country have demanded that their schools not be staffed predominantly by white teachers, but that black principals and black teachers also appear before the black children." *Id.* Of course, the bottom line here is the constitutional imperative that staffing decisions be neutral and "that you don't want an absence of either race or ethnic group in any school if you can avoid it." *Id.*

The court tells us that the distinction between faculty and staff is important, but never comes to grips with what that distinction is. Court's Opinion at 47 [App. 52-53b]. On the basis of absolute numbers, it appears that 167 minority employees are involved with the educational function (the first group above plus teacher aides) and 67 minority employees are involved with the service function. The strong implication of this court--that minorities are being hired merely for janitorial and service jobs--is not supported. Moreover, such an implication is inconsistent with the court's

observation that the current superintendent is black, as are several principals and managerial personnel. Court's Opinion at 67 [App. 74b].

The district court recognized that there was a "tendency to have more minority staff in schools with a greater than average minority student population," yet after a careful review of all the evidence, decided that there was not a current condition of segregation with respect to staff assignment. *Brown*, 671 F. Supp. at 1305. In deciding that faculty/staff assignment remains segregated, Court's Opinion at 49 [App. 54b], this court has relied in part upon the extremes of the data to conclude there is an unlawful pattern. For example, in 1985-86, every elementary school had some minority staff, with the exception of McClure.[37] Only one

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37

Elementary School Faculty/Staff Assignment
1985-86

	Staff			
Elementary School	Minority	Total	Minority %	White %
Avondale East	10.45	31.40	33.3	66.7
Avondale West	1.00	25.80	3.9	96.1
Belvoir	3.85	25.95	14.8	85.2
Bishop	.40	23.80	1.7	98.3
Crestview	3.40	31.65	10.7	89.3
Gage	1.00	21.00	4.8	95.2
Highland Park Central	3.90	34.60	11.3	88.7

(continued...)

elementary school had more than 7 minority faculty/staff, Avondale East at 10.45 faculty/staff members. Yet, that is the one the court uses to illustrate its apparent conclusion that there is a segregated system of faculty staff assignment at the elementary level. Court's Opinion at 48 [App. 53b]; *see also id.* at 66 [App. 73b]. When one looks at the elementary data, it is apparent that a perfectly uniform distribution is unlikely given the lack of elementary minority personnel--there were 42 elementary classroom

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[37](...continued)

Highland Park North	5.50	28.60	19.2	80.8
Highland Park South	5.40	29.20	18.5	81.5
Hudson	3.80	19.75	19.2	80.8
Lafayette	5.65	32.60	17.3	82.7
Linn	0.30	17.80	1.7	98.3
Lowman Hill	6.50	25.60	25.4	74.6
Lundgren	2.80	21.55	13.0	87.0
McCarter	3.00	27.40	10.9	89.1
McClure	0.00	25.10	00.0	100.0
McEachron	1.00	23.50	4.3	95.7
Potwin	2.00	14.15	14.1	85.9
Quincy	1.00	32.35	3.1	96.9
Quinton Heights	4.40	20.40	21.6	78.4
Randolph	1.00	27.00	3.7	96.3
Shaner	2.00	21.90	9.1	90.9
State Street	1.30	22.90	5.7	94.3
Stout	2.00	20.60	9.7	90.3
Sumner	1.85	23.30	7.9	92.1
Whitson	1.00	35.35	2.8	97.2
Total	74.50	663.25	11.23	88.77

Rec. ex. vol. IV at 261.

teachers and 74.50 minority faculty/staff members to be assigned to 26 elementary schools. Rec. ex. vol. IV at 261, 268.

Likewise, the court compares Robinson Middle School with 12.20 minority staff members out of 49.35, not with other middle schools[38], but with Topeka West High School which had 3 minority out of 120. Court's Opinion at 48 [App. 53b]. Note that in 1984-85 Topeka West had almost three times the minority faculty/staff (8.55 out of 114.30) than it did in 1985-86.

38

Middle School and High School Faculty/Staff Assignment
1985-86

School	Minority	Staff Total	Minority %	White %
Chase	7.45	40.50	18.4	81.6
Eisenhower	12.10	65.25	18.5	81.5
French	2.40	42.63	5.6	94.4
Jardine	3.80	39.65	9.6	90.4
Landon	3.00	31.10	9.6	90.4
Robinson	12.20	49.35	24.7	75.3
Highland Park H.S.	13.65	118.35	11.5	88.5
Topeka H.S.	25.50	150.10	17.0	83.0
Topeka West	3.00	120.00	2.5	7.5
Total	83.10	656.83	12.65	87.35

Rec. ex. vol. IV at 262.

Given the court's interest in complete data which breaks out the professional staff that actually works in the particular schools, it is most surprising that the court's opinion does not cite or discuss the minority staffing report for 1986-87 which finally includes administrative and certificated staff assigned to the schools. Rec. ex. vol. II at 160-61. Although admitted over plaintiffs' objection, rec. vol. XVI at 2523-2525, this more current and more relevant report presents a far less extreme picture of minority assignment for the system. Every school in the system has minority personnel. With a 10.78% minority average for elementary school personnel (55 out of 510), elementary schools range from 4.35% minority staffing (Quincy) to 18.18% (Avondale East and Highland Park North).[39] More significant, because of the small

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[39]

Minority Staffing Report
Elementary Schools
Includes Administrative and Certificated Staff
1986-87

Elementary School	Staff Minority	Total	Minority %
Avondale East	4.0	22.0	18.18
Avondale West	1.0	19.0	5.26
Belvoir	3.0	18.0	16.67
Bishop	1.0	18.0	5.56
Crestview	3.0	25.0	12.00

(continued...)

numbers involved, is that every elementary school has from one to four minority personnel. Rec. vol. II at 161.

With a 13.22% minority average for middle school personnel (23 out of 174), schools range from 6.67

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[19](...continued)

Gage	1.0	14.0	7.14
Highland Park Central	4.0	25.0	16.00
Highland Park North	4.0	22.0	18.18
Highland Park South	4.0	23.0	17.39
Hudson	2.0	13.0	15.38
Lafayette	4.0	27.0	14.81
Linn	1.0	12.0	8.33
Lowman Hill	3.0	23.0	13.04
Lundgren	1.0	16.0	6.25
McCarter	2.0	22.0	9.09
McClure	1.0	20.0	5.00
McEachron	1.0	19.0	5.26
Potwin	1.0	13.0	7.69
Quincy	1.0	23.0	4.35
Quinton Heights	2.0	16.0	12.50
Randolph	1.0	23.0	4.35
Shaner	2.0	17.0	11.76
State Street	1.0	19.0	5.26
Stout	2.0	19.0	10.53
Sumner	3.0	17.0	17.65
Whitson	2.0	26.0	7.69
Total	55.0	510.0	10.78

Rec. ex. vol. II at 160-61.

(Jardine) to 16.67% (Robinson).[40] Every school has from two to seven minority personnel. Finally, at the high school level there is a minority average of 9.77% for high school personnel, ranging from 5.88% (Topeka

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40

Minority Staffing Report
Middle Schools
Includes Administrative and Certificated Staff
1986-87

Middle School	Staff Minority	Total	Minority %
Chase	3.0	27.0	11.11
Eisenhower	7.0	45.0	15.56
French	5.0	36.0	13.89
Jardine	2.0	30.0	6.67
Robinson	6.0	36.0	16.67
Total	23.0	174.0	13.22

Rec. ex. vol. II at 160-61.

West) to 11.84% (Highland Park High).[41] The range is from five to eleven minority faculty members.

D.

The district court recognized that the "pattern identified by the plaintiffs is not monolithic." *Brown*, 671 F. Supp. at 1305. And it is not. The numerical evidence on this point cuts both ways. But this court's finding that this is "a system that has kept white faculty at primarily white schools and minority faculty at predominantly minority schools," Court's Opinion at 68 [App. 74b], appears radical given these numbers.

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[41]

Minority Staffing Report
High Schools
Includes Administrative and Certificated Staff
1986-87

High School	Staff Minority	Total	Minority %
Highland Park H.S.	9.0	76	11.84%
Topeka H.S.	11.0	95.0	11.58
Topeka West H.S.	5.0	85.0	5.88
Total	25.0	256.0	9.77

Rec. ex. vol. II at 160-61.

Moreover, I agree with the district court that "as important as the racial percentages of the faculty and staff is the fair assignment of qualified and dedicated faculty throughout the district." *Id.*; *see also Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 280 n.15 (one must not lose sight of educational function of schools). This is a school district that is applying the research concerning effective schools.[42] *See* U.S. Dep't of Education, *What Works-Research About Teaching and Learning* 45 (1986) ("The most important characteristics of effective schools are strong instructional leadership, a safe and orderly climate, school-wide emphasis on basic skills, high teacher expectations for student achievement, and continuous

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[42] Dr. Herbert Walberg testified, based on his on-site visits and review of the school system that "it's an excellent system and that is concentrating its resources on improving the children--improving the education and achievement of all the children in the system." Rec. supp. vol. VII at 2042-43. He found that: 1) "effective schools' techniques were apparent in the schools," 2) uniform curriculum guides were in use throughout the district, 3) students are tested regularly and there are high expectations placed on students, 4) the Adventure Center, *see supra* note 15, was "one of the most impressive educational experiences [he had] seen in public schools" and it gives white and black students exposure to one another, 4) there is "a great deal of constructive parental involvement," 5) schools are safe, orderly and well-maintained, 6) there is "an award-winning Head Start program and many multi-cultural and ethnic programs," and 7) the preceding items account for "the district's outstanding achievement test scores which have been high and rising for the past several years." Rec. supp. vol. VII at 2033-35.

assessment of pupil progress."); rec. supp. vol. V at 1584-1608, 1635-36 (district has uniform curriculum guides), 1641-42, 1651-53, 1749; supp vol. VII at 2033; vol. XII at 2521-22. It is a system in which schools throughout the district have received outside recognition. Rec. supp. vol. V at 1617-18 (Highland Park H.S., 1984), 1619-20 (Topeka West H.S., 1985), 1620-21 (Eisenhower Middle School, 1985), 1621 (Highland Park Central, 1985), 1622 (School District, 1986), 1623, (Topeka West H.S.--National School of Excellence, 1984; Robinson Middle School--National School of Excellence, 1985), 1624 (Bishop Elementary School--State Program of Excellence, 1986), 1732 (Head Start, 1974). Finally, the evidence clearly established that the Topeka schools are committed to an awareness of cultural diversity and equal educational opportunity for all. Rec. supp. vol. V at 1759, 1632, 1653-54, 1657-58, 1686, 1717, 1760-61, 1772-73; vol. XII at 2444-45. Ironically and commendably, this is a district that includes the study of *Brown v. Board of Education* in its curriculum. Rec. supp. vol. V at 1722.

VII.

At trial, plaintiffs contended that eight schools were "racially identifiable non-white or vestige schools." *Brown*, 671 F. Supp. at 1297. These included Eisenhower Middle School and seven elementary schools: Avondale East, Belvoir, Highland

Park North, Hudson, Lafayette, Lowman Hill and Quinton Heights. The court has analyzed the latter six of these schools for "what the district did and did not do," Court's Opinion at 74-75 [App. 81b], totally ignoring the district court's findings and the *de facto* reasons for the racial composition of these schools. Court's Opinion at 74-82 [App. 81-89b]. Part of the court's analysis of these schools is contained in an earlier part of its opinion. *See* Court's Opinion at 68-71 [App. 75-77b] (discussing attendance boundaries of Lafayette, Quinton Heights and Lowman Hill). Appendix A [App. 192c] contains the 1969-70 elementary school attendance boundaries; appendix B [App. 193c] contains those for 1985-86.

Ironically, this court's analysis of these racially identifiable schools is placed in a section entitled "The Causal Link Between *De jure* Segregation and Current Condition of Segregation." Court's Opinion at 52 [App. 58b]. The court steadfastly refuses to consider an alternative interpretation of the evidence which would show the absence of a link between the present lack of perfect racial balance and the prior *de jure* segregation. The court's position is that any consideration of demographic factors which resulted in a lack of racial balance would be to absolve the school board of its affirmative duty *Id.* at 58-60, 74 [App. 64-67b, 81b]. Not so. Courts routinely have considered the presence or absence of demographic factors over which the school board had no control in deciding whether school systems were unitary. *See*, *e.g.*,

Morgan, 831 F.2d at 320 (system unitary; court considered racial concentration in court-drawn school districts); *Lawrence*, 799 F.2d at 1043 ("In Lawrence County, unlike the situation in *Pasadena Board of Education*, the School Board's failure to achieve a desegregated school system has not resulted from population migration into, or out of, or within this small rural county."); *Ross*, 699 F.2d at 226 (system unitary; current housing patterns after desegregation order resulted in several one-race schools). The rationale for this is best stated by this court in a passage concerning one-race schools:

> Although virtual one race schools "require close scrutiny," they are not always unconstitutional.[18]
>
> [18] Given modern urban demography and geography, one-race schools may well have evolved for reasons beyond school board control. *See Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975). Thus, where a school system consists of *de facto* one-race schools, rather than *de jure*, the system is not unconstitutional.

Court's Opinion at 19, 19 n.18 [App. 20b, 20b n.18]. The above is equally applicable to schools which depart from the system-wide minority average--"they are not always unconstitutional" for they "may well have evolved for reasons beyond school board control." *Id.*

Concerning these eight schools that the plaintiffs contend are "racially identifiable," the district court found that "the schools are attended by more white students than black students (1,248 white students, 1,079 black students). Indeed, white students make up close to half (49.3%) of all the students that attend these allegedly non-white schools." *Brown*, 671 F. Supp. at 1298. As the following reveals, there is no need for the appellate fact finding that is going on here, the district court's finding that these schools do not reflect a current condition of unlawful segregation is not clearly erroneous; indeed, it is amply supported by the record and the weight of the evidence. Moreover, the district court's factfinding is free of several errors which permeate the appellate factfinding.

A.

Belvoir elementary was annexed in approximately 1959, thus plaintiffs cannot claim it was a vestige of the former *de jure* system. Rec. supp. vol. XI at 148. This court attaches significance to the fact that Belvoir's

student population has not been less that 50% minority. Court's Opinion at 75 [App. 81-82b]. Yet, the district court carefully explained why this does not create liability:

> Belvoir Elementary School is centered in an area with a high minority population. It is surrounded by other schools with higher than average minority populations. It is not *the* black school in a racially mixed area. It is a school with a higher than average black student population in a residential area with a higher than average black population.

Brown, 671 F. Supp. at 1300 (emphasis in original). The district court made further findings, which certainly are corroborated by the data on racial composition.[43] The district court's findings also are

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43

Racial Inventory-Belvoir Elementary
1952-1985

Year	Minority	White	Total	% Minority
1952	66	379	445	14.8
1960	82	276	358	22.7
1966-67	255	172	427	59.72

(continued...)

supported by the defendants' expert Dr. Clark, who analyzed Belvoir's hypothetical racial composition, assuming its boundaries remained constant. Rec. ex. vol. I at 28, 34-35.

The district court found that two federally subsidized housing projects constructed in 1963 (Pine Ridge; 210 family units) and in 1965 (Trail Ridge; 148 family units) caused the minority elementary student population to increase to over 50%. *Brown*, 671 F. Supp. at 1302; rec. ex. vol. IV at 215. Plaintiffs' expert Mr. Lamson did not take these housing projects

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[43](...continued)

1967-68	276	210	486	56.79
1968-69	294	224	518	56.76
1969-70	274	176	450	60.88
1970-71	232	131	363	63.91
1971-72	187	124	311	60.51
1972-73	228	135	363	62.81
1973-74	218	102	320	68.12
1974-75	198	97	295	67.12
1975-76	168	67	235	71.49
1976-77	190	45	235	80.85
1977-78	163	48	211	77.25
1978-79	159	57	216	73.61
1979-80	150	52	202	74.26
1980-81	152	49	201	75.62
1981-82	167	99	266	62.78
1982-83	156	107	263	59.32
1983-84	121	82	203	59.61
1984-85	112	81	193	58.03
1985-86	146	90	236	61.86

Rec. vol. IV at 460, supp. vol. XI at 149, 152; ex. vol. IV at 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 93, 97, 101, 105, 109, 122, 134, 146, 158 & 170.

into account. Rec. vol. IV at 463. The district court also found that closing Rice Elementary in 1981 and reassigning some of those students to Belvoir improved the racial balance at Belvoir. *Brown*, 671 F. Supp. at 1302. This court characterizes the closing as having "a modest desegregative effect at Belvoir," Court's Opinion at 75 [App. 82b], but the data reveal that the minority percentage dropped by approximately 13%. *See supra* note 43. The Belvoir attendance district now is largely minority and the changed racial mix in the school has been caused by actions other than those of the school board. *See Higgins*, 508 F.2d at 791 ("the law imposes no affirmative duty upon school officials to correct the effects of segregation resulting from factors over which they have no control").

B.

This court's complaint about Hudson Elementary is that "[w]hile the passage of time has dissipated Hudson's identity as a white school, this change is due solely to the spread of minorities into its attendance area, not to any action by the school district." Court's Opinion at 76 [App. 82-83b]. It seems anomalous to find fault with the school board concerning residential movement which altered the original racial composition at Hudson. But it is consistent with this court's view that residential patterns which detract from racial balance are *always* the responsibility of the school board, while residential migration which improves

racial balance should not inure to the benefit of the school board insofar as liability is concerned. *See* Court's Opinion at 27 *[App. 30b]* ("*A showing that the* school district has not promoted segregation and has allowed desegregation to take place where natural forces worked to that end is insufficient."). Following this logic, residential movement could lead to absolute racial balance and still support a finding of school board liability, especially given the court's view that a school which approaches the system-wide minority average may *still* be racially identifiable.

Apparently, the defendants are constitutionally liable for Hudson because it now exceeds the system-wide minority average by 20%, with a 46.55% minority student population. *See* Court's Opinion at 76 [App.82-83b]. The plaintiffs view Hudson as racially identifiable black, notwithstanding that 53.45% of the students were white in 1985-86. Appellants' Brief at 38; *Brown*, 671 F. Supp. at 1301. Hudson is perhaps the archetype for illustrating the court's refusal to consider the effect of demographic factors which result in changing student racial composition at various schools. The district court gave clear reasons explaining the racial composition at Hudson, reasons which do not encompass liability for these defendants. Hudson was constructed in 1963 and has steadily

increased in minority enrollment.[44] The boundaries of Hudson have not changed since 1964. Rec. ex. vol. IV at 13-29. The district court found that "the construction of subsidized housing projects in the Hudson attendance area" in 1965 (Colonial

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44

Racial Inventory-Hudson Elementary
1966-1985

Year	Minority	White	Total	%Minority
1966-67	18	202	220	8.18
1967-68	24	272	296	8.11
1968-69	23	312	335	6.87
1969-70	33	306	339	9.73
1970-71	68	322	390	17.44
1971-72	83	268	351	23.71
1972-73	80	223	303	26.40
1973-74	83	211	294	28.23
1974-75	79	202	281	28.11
1975-76	99	175	274	36.13
1976-77	88	176	264	33.33
1977-78	86	154	240	35.83
1978-79	71	148	219	32.42
1979-80	80	155	235	34.04
1980-81	78	155	233	33.48
1981-82	88	142	230	38.26
1982-83	88	142	230	38.26
1983-84	105	124	229	45.85
1984-85	105	132	237	44.30
1985-86	108	124	232	46.55

Rec. ex. vol. IV at 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 93, 97, 101, 105, 109, 123, 135, 147, 159 & 171.

Townhouses; 137 family units), in 1967 (Highland Park Apartments; 200 family units) and in 1970 (Deer Creek; 92 family units), together "with the general increase of minority residents on the east side," was responsible for the increase in minority enrollment at Hudson. *Brown*, 671 F. Supp. at 1302; rec. ex. vol. IV at 215. Plaintiff's expert Mr. Lamson did not take into account the effect of any of these demographic changes. Rec. vol. IV at 464-65.

Plaintiffs' position concerning Hudson and Avondale is legally untenable. After conceding that the increased minority enrollment at Hudson and Avondale East is "purely [the] result of residential change," plaintiffs continue:

> In a *de jure* school system, the school board has the duty to react to residential change to ensure that no school becomes disproportionately Black. *Swann*, 402 U.S. at 14. The failure of the Topeka School Board to prevent Hudson and Avondale East from becoming disproportionately Black is a constitutional violation.

Appellants' Brief at 38. Plaintiffs' position is not supported by the law or the facts. After two desegregation plans and over thirty years after *Brown I* and *Brown II*, it cannot be said that Topeka operates

a *de jure* system. Apparently, plaintiffs' conception of the duty imposed by the Supreme Court is never-ending. The Court, however, has declared to the contrary. In *Swann*, the Court recognized that once the constitutional violation is eliminated, school authorities are not "constitutionally required to make year-by-year adjustments of the racial composition of student bodies" even if the community experiences demographic changes. *Swann*, 402 U.S. at 31-32. Moreover, there is no requirement that every school in the district reflect the system-wide average minority enrollment, either before or after a finding of unitariness. *See Pasadena*, 427 U.S. at 434.

C.

Like Belvoir, Highland Park North Elementary was not part of the Topeka system in 1954. Instead it was annexed in 1959, rec. vol. IV at 394, and is estimated to have had close to the system-wide average of

minority students then.[45] There has been a steady increase in minority students attending due to residential

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45

Racial Inventory-Highland Park North Elementary
1952-1985

Year	Minority	White	Total	%Minority
1952	18	1,158	1,176	1.5
1960	47	500	547	8.5
1966-67	119	432	551	21.60
1967-68	157	371	528	29.73
1968-69	145	368	513	28.27
1969-70	180	350	530	33.96
1970-71	143	319	462	30.95
1971-72	159	282	441	36.05
1972-73	152	245	397	38.29
1973-74	135	211	346	39.01
1974-75	142	194	336	42.26
1975-76	146	201	347	42.07
1976-77	140	169	309	45.31
1977-78	127	142	269	47.21
1978-79	170	121	291	58.42
1979-80	169	103	272	62.13
1980-81	149	111	260	57.31
1981-82	190	122	312	60.90
1982-83	197	128	325	60.62
1983-84	198	121	319	62.07
1984-85	174	125	299	58.19
1985-86	179	130	309	57.93

Rec. supp. vol. XI at 149, 152; ex. vol. IV at 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 93, 97, 101, 105, 109, 123, 135, 147, 159, & 171.

patterns. *Brown*, 671 F. Supp. at 1302. This court's complaint is that when Parkdale closed in 1978, the "reassignment [of Parkdale students] increased Highland Park North's minority percentage at a time when it was already high." Court's Opinion at 76 [App. 83b]. As the district court points out, however, the school board was able to close Parkdale, a predominantly black school (85.6% minority) while reassigning its students to a nearby school, Highland Park North. *Brown*, 671 F. Supp. at 1302. Moreover, as footnote 45 indicates, the increased minority percentage was caused by two factors: an increase of 43 (170-127) minority students and a decrease of 21 (142-121) white students. Considering the court's fleeting approach to some of these schools, *see*, *e.g.*, Court's Opinion at 76 [App. 82-83b], it is unclear how the court's observation trumps the district court's reasoned analysis rejecting constitutional liability.

D.

Lafayette Elementary began as an all-white *de jure* school. *Id.* at 1302. It has increased in minority enrollment and has remained a majority-minority school, although the composition of the minority groups

has varied over the years.[46] *Id.* (noting that minority

46

Racial Inventory-Lafayette Elementary
1953-1985

Year	Non-Black Minority	Black	White	Total	%Minority
1953	0	0	382	382	0
1954	0	0	332	332	0
1955	0	47	314	361	13.0
1956	0	50	315	365	13.7
1966-67	136	125	218	479	54.49
1967-68	133	140	188	461	59.22
1968-69	131	144	247	522	52.68
1969-70	157	152	244	553	55.88
1970-71	162	170	249	581	57.14
1971-72	134	186	261	581	55.07
1972-73	108	177	167	452	63.05
1973-74	91	190	163	444	63.28
1974-75	102	179	127	408	68.87
1975-76	67	221	140	428	67.29
1976-77	36	117	86	239	64.02
1977-78	36	124	97	257	62.26
1978-79	48	170	110	328	66.46
1979-80	47	131	108	286	62.24
1980-81	40	143	131	314	58.28
1981-82	60	166	177	403	56.08
1982-83	58	180	163	401	59.35
1983-84	59	187	194	440	55.91
1984-85	60	161	172	393	56.23
1985-86	59	158	165	382	56.81

(continued...)

composition was 56-59% over the last five years, with a varied composition). This court notes that federally subsidized housing projects were built in the area in the early 1960's. Court's Opinion at 77 [App. 83b]; rec. ex. vol. IV at 215 (1961-Eastboro Apts.; 28 family units; 1962-Eastboro Apts.; 76 family units). More units were built in 1970. Rec. ex. vol. IV at 215 (Ripley Park Apts., 102 family units).

This court first looks to 1966 and reports the racial compositions of Lafayette's neighboring schools (omitting Highland Park North). Court's Opinion at 77 [App. 84b]. I have done the same in chart form comparing the minority percentages with the surrounding schools, in 1966 and now.

School	Direction from Lafayette	1966-67 Minority %	1985-86 Minority %
Lafayette		54.49	56.81
Parkdale	SW	93.12	closed 1978 (35.62% min.)

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[46](...continued)
Rec. supp. vol. XI at 56, 57, 58, 59; ex. vol. IV at 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 93, 97, 101, 105, 109, 123, 135, 147, 159 & 171; *see also* ex. vol. IV at 37-38 (estimating 8.4% minority percentage in 1955 which district court relied upon).

Sumner	NW	12.29	31.47
State Street	NE-	27.52	26.26
Rice	E	3.00	closed 1981 (33.55% min.)
Belvoir	SE	59.72	61.86
Highland P.N.	SW	21.60	57.93

Rec. ex. vol. II at 48-A, 49-B; ex. vol. IV at 54-55, 97, 109, 170-74. The court then concludes that Lafayette "remains a transition school between schools with higher minority percentages to the south and lower percentages to the north and west." Court's Opinion at 77 [App. 84b]. To understand what the court means, it is necessary to refer to the court's previous discussion on school boundaries. Court's Opinion at 70 [App. 77b]. There, the court decides that Lafayette is the product of segregated boundaries because it has a different minority percentage than every one of its neighboring schools. In the words of the court:

> The border between Lafayette and State Street, the school to Lafayette's north, has functioned as the boundary between the mostly white area served by State Street and the school to its north [Lundgren] . . . and the schools to its south and southwest [Highland Park North and Belvoir]. Lafayette has long had twice the minority

> population of State Street; thus, since 1966, Lafayette's minority population has ranged from 52% to 69% while State Street's has ranged from 27% to 34%.

Id. (footnote omitted). This conclusion is remarkable not only because it is appellate factfinding concerning intent including noncompliance with the affirmative duty on "objective" facts that are far from obvious, but also because it ignores that the surrounding population of the Lundgren and State Street schools (as of 1980) had far less black concentration than did the surrounding population of Lafayette, Highland Park North and Belvoir. *See* rec. ex. vol. I at 49. Moreover, it conflicts with the district court's finding on this point attributing the increased minority percentage to demographic factors, *Brown*, 671 F. Supp. at 1303, rather than a "segregative effect" of boundary changes by defendants. The district court's finding is supported by common sense and the defendants' expert, Dr. Clark. *See* rec. ex. vol. I at 35, 43-45.

Once again, the district court's findings make more sense than ours. Looking at the chart, *see supra* p. 119 [App. 147-148c], it is apparent that Topeka closed two schools with greater and lesser minority concentrations than Lafayette. The district court noted that the closing of Parkdale resulted in the minority percentage increasing by four percent (from 62% to 66%), *Brown*,

671 F. Supp. at 1302; however, the next year saw the percentage return to its prior level (from 66% to 62%), and decrease thereafter. *See supra* note 42. The district court then thought that the closing of Rice, which resulted in reassignment of some students to Lafayette, may have contributed to the minority percentage decreasing in future years. *Brown*, 671 F. Supp. at 1302. Dr. Clark, defendants' demographic expert, using residential population data which had a high correlation (.8 to .9 out of 1.0) with school attendance data, viewed the increased minority percentage at Lafayette as a result of demographic changes. He concluded that the closure of Parkdale with respect to Lafayette, was overall desegregative. Rec. vol. XI at 2338, 2373, 2388-89; ex. vol. I at 35, 43, 45.

This court's ultimate conclusion, that "[u]nder its neighborhood school plan, the school district simply maintained Lafayette as a school with disproportionate minority percentages," Court's Opinion at 77 [App. 84b]; *see also id.* at 70 [App. 77b], ignores the demographic factors involved and implies that the school district had an obligation to racially balance Lafayette because it exceeded the system-wide minority percentage.

E.

Like Lafayette, Quinton Heights Elementary began as an all-white *de jure* school. *Brown*, 671 F. Supp. at 1303. The district court noted the steady increase in minority student population, and that the minority concentration has remained approximately 50% over the last several years.[47] *Id.* This court's approach to

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Racial Inventory-Quinton Heights Elementary
1953-1985

Year	Minority	White	Total	%Minority
1953	0	187	187	0
1954	10	288	298	3.4
1955	23	308	331	6.9
1956	26	329	355	7.3
1966-67	114	199	313	36.42
1967-68	102	184	286	35.66
1968-69	103	192	295	34.92
1969-70	113	161	274	41.24
1970-71	133	157	290	45.86
1971-72	108	188	296	36.48
1972-73	93	161	254	36.61
1973-74	92	160	252	36.51
1974-75	84	143	227	37.00
1975-76	77	120	197	39.09
1976-77	78	126	204	38.24
1977-78	62	120	182	34.07
1978-79	67	105	172	38.95
1979-80	111	110	221	50.23
1980-81	119	115	234	50.85

(continued...)

analyzing the school has been to adopt the conclusion of plaintiffs' expert contained in his report and testimony, while simplifying the analysis and not discussing the effect of allegedly segregative optional attendance zones, as did Mr. Lamson. *See* Court's Opinion at 78-79 [App. 85b]; rec. vol. XI at 139-48, 173-78 (Lamson Report on Quinton Heights, School Closings), vol. III at 248-59 (Lamson testimony concerning Quinton Heights) (cited in Court's Opinion at 78 n.88 [App. 85b n.88]), 284, 287, 290-93 (closure of Monroe and Polk and affect on Quinton Heights); *see also* Court's Opinion at 54-55 [App. 61b] (summarizing 1955-65 in Topeka system--"Plaintiffs introduced evidence tending to show that the school district's use of portable classrooms and optional attendance zones served to maintain segregation by concentrating students of one race at certain schools."). Of course, to adopt the full analysis with the discussion

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[47](...continued)

1981-82	150	117	267	56.18
1982-83	138	127	265	52.08
1983-84	151	125	276	54.71
1984-85	149	140	289	51.56
1985-86	129	132	261	49.43

Rec. supp. vol. XI at 56, 57, 58, 59; ex. vol. IV at 55, 59, 63, 67, 71, 75, 79, 83, 87, 90, 94, 97, 101, 105, 109, 125, 137, 149, 161 & 173; *see also* ex. vol. IV at 37-38 (estimating 2.8% minority percentage in 1955 which district court relied upon).

of optional attendance zones would conflict with the district court's finding that "any segregative effect of the zones was slight and does not remain today." *Brown*, 671 F. Supp. at 1298. The district court's finding, which necessarily includes the optional attendance zones discussed by plaintiffs' expert, is supported by the testimony and report of defendants' expert Dr. Clark. Rec. vol. XI at 2304-05, 2309-10, 2318-19, 2321-22, 2327-28. Dr. Clark analyzed the effect of boundary changes in Topeka, including optional attendance zones. *See supra* note 30; *see also* rec. ex. vol. I at 19. But concerning school closings, the court has been convinced by the testimony of plaintiffs' expert.

Again, we track this court's odyssey. The court begins by considering two closings: Pierce and Van Buren. In 1957, Pierce was annexed to the district; in 1958 the adjacent schools to the west with which it shared a common boundary were Quinton Heights and Monroe. Rec. supp. vol. XI at 140; rec. ex. vol. IV at 12. In 1958, the enrollment began to decline at Quinton Heights at an average rate of 21 students per year. Rec. supp. vol. XI at 142. In 1959, the 79 remaining black students at Pierce were assigned to three other elementary schools: Quinton Heights, Highland Park North, and Highland Park Central. *Id.* at 142. Plaintiffs' expert admitted that what effect this had on the racial composition of Quinton Heights is not known. *Id.* at 143. Mr. Lamson also reported that

during 1956-66 Quinton Heights lost white students while gaining black students. *Id.* at 142.

In 1962, the attendance boundary of Quinton Heights was expanded northward into what had been areas served by Van Buren and Central Park. *Id.* at 144; rec. vol. III at 251. This resulted in a gain of 45 students for Quinton Heights after it had lost an average of 21 students for the previous 4 years. Rec. supp. vol. XI at 144. Van Buren, however, still had an attendance area and continued to operate. In 1964, Van Buren was closed; most students were sent to Monroe; some were sent to Quinton Heights.[48] Rec. vol. III at 255; supp. vol. XI at 145-46.

This court continues with the observation that by 1966 the minority percentage of Quinton Heights was 36.4% and certain schools surrounding Quinton Heights

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[48] In footnote 88, Court's Opinion at 78 [App. 85b], the court tells us about these two northward expansions of the boundary of Quinton Heights. Regarding the second expansion, we are told: "The area assigned to Quinton Heights was apparently empty of people at the time." *Id.* I don't think so. If that statement were true, there would have been no students to send to Quinton Heights when Van Buren closed in 1964. The discussion in the transcript concerning the uninhabited area pertains to only a part of the area which was added--the fairgrounds. *See* rec. vol. III at 252-253 (1962 northward expansion took in 3 areas; central third is the fairgrounds without permanent residents, eastern third is east of the fairgrounds and 0-100% black, and western third is west of the fairgrounds and 0-89.9% black), *id.* at 1255 (remainder of fairgrounds added to Quinton Heights' attendance area in 1964, as well as part of the residential areas of Van Buren and Monroe).

had greater and lesser concentrations of minority students. Court's Opinion at 78 [App. 84-85b]. And so we continue. The following chart provides more detail.

School	Direction from Quinton Heights	1966-67 Minority %	1985-86 Minority %
Quinton Heights		36.42	49.43
Highland Park Central	SE	16.64	35.09
Avondale East	SE	14.96	44.14
Avondale West	SW	1.26	16.61
Stout	W	.50	26.83
Central Park	NW	15.49	closed 1980 (42.90% min.)
Polk	N	11.54	closed 1979 (48.00% min.)
Monroe	NE	79.45	closed 1975 (82.73% min.)
Highland Park North	NE	21.60	57.93

Brown, 671 F. Supp. at 1299; rec. ex. vol. I at 48A; ex. vol. IV at 54-55, 87, 101, 105, 170-73. The court tells us that by 1966 Quinton Heights "was bordered by heavily minority Monroe elementary school and otherwise by primarily white schools." Court's Opinion at 78 [App. 85b]. This statement is in error.

The average minority percentage in 1966 for elementary schools was 16.49%. Rec. ex. vol. IV at 56. Keeping this in mind, it appears that other schools, besides neighboring Monroe, had minority percentages which very nearly met, or exceeded, the system-wide elementary average. As the above chart points out, Highland Park Central, Avondale East, Central Park and Highland Park North simply are not one-race white or virtually one-race white schools. Moreover, I do not see the significance of the court's statement that Quinton Heights had the seventh largest minority population out of 35 schools. How does this fact create liability? Thus, the district court did not err when it rejected the attempt to "characterize the reassignments in the 1960s as part of a process of focusing Quinton Heights as a school for black students." Court's Opinion at 78 [App. 85b].

The court next demonstrates its ability to find its own facts by describing the population density maps in relation to a neighboring school of Quinton Heights: "Indeed, on the maps available to us, it is quite noticeable that Polk's boundaries in 1970 correspond closely to a patch of white population surrounded by

minority population assigned to other schools, including Quinton Heights." Court's Opinion at 78-79 [App. 85b]. The court's subjective observation demonstrates the limitations of its approach. The map cited by the court, rec. ex. vol. I at 67, tells us the percentage of black population by block. Notwithstanding the intended breadth of the court's analysis, the map does not tell us about other minorities, e.g., hispanic. Nor does it tell us much about population density or anything about student density. *See* rec. vol. IV at 485. Yet, the court's clear implication from looking at the map is that the boundary around Polk as of 1970 was drawn in such a way as to exclude minorities. The following chart, comparing the minority percentages of Polk with its neighboring schools, including Quinton Heights, as of 1970, the date of the map, undercuts the court's finding.

School	Direction from Polk	1970 Minority %
Polk		21.33
Monroe	SE	79.91
Quinton Heights	S	45.86
Central Park	SW	24.53
Lowman Hill	NW	41.52
Clay	NW	21.26

Rec. ex. vol. I at 48A; rec. ex. vol. IV 70-71. The court's finding is suspect for at least two reasons. First, as the above chart shows, the minority population in the area is dispersed to several schools in the area. Polk is hardly an all-white school, with a 78.67% white student enrollment. Indeed, after Monroe closed in 1975, plaintiffs' expert Mr. Lamson testified that Polk was racially disproportionate black with a 30.4% black enrollment, while the elementary average was 14.82%. Rec. vol. III at 284 and supp. vol. XI at 173; ex. vol. IV at 91. Second, Polk exceeded the system-wide minority elementary average which was 18.67% in 1970. Rec. ex. vol. IV at 72. These factors, not considered by this court, convince me that the court has made a finding in error.

Continuing with the analysis of Quinton Heights, the court next complains about two adjacent school closures in the 1970's because they resulted in extending the northern boundary of Quinton Heights into northern areas with high minority concentrations. Court's Opinion at 79 [App. 85-86b]. Unfortunately, the court does not share with us which closings are involved, *id.*, but I suspect they are Monroe which closed in 1975, and Polk which closed in 1979. When Monroe closed, its attendance area was divided between Polk, Highland Park North and Quinton Heights. Rec. supp. vol. XI at 173. As I previously noted, the effect on Quinton Heights was negligible; although the minority percentage increased from 37 to 39.09%,

seven fewer minority students attended in 1975. *See supra* p. 62-63 [App. 75-76c] (noting that 2.09% increase largely due to declining white enrollment). Indeed, not until the fall of 1979 did the number of minority students at Quinton Heights exceed what existed immediately prior to the closing of Monroe. Thus, expanding Quinton Heights' attendance area northward when Monroe closed could hardly support a firm and definite conviction that Quinton Heights' boundaries were being manipulated so as to racially identify the school as intended for minority students.

Apparently the closing of Polk resulted in the reassignment of its students to Quinton Heights, Sumner, and Lowman Hill. Rec. vol. III at 291. The minority percentage at Quinton Heights did increase from 38.95% (in 1978-1979) to 50.23% (in 1979-80), with the addition of 44 minority students and 5 white students. This is the only action here which arguably is indicative of inattention to the affirmative duty. The district court, however, rejected that inference. *Brown*, 671 F. Supp. at 1303. Based on the foregoing, I cannot agree with the statement that: "It is thus clear that Quinton Heights' current boundaries are the result of continued manipulation by the school district." Court's Opinion at 79 [App. 85b]. The court's analysis is inconsistent with its contention that the district court should not have focused on intent, and that there was indeed none. Court's Opinion at 38-39 [App. 42-43b].

The court attaches great significance to the fact that Quinton Heights is a relatively long district which extends into minority populations in the north and east. *Id.* at 79 [App. 85-86b]. But what the court does not point out is that the southernmost part includes all of the area for Topeka Country Club and the Kansas National Guard Armory, which easily comprises one-quarter of the school's attendance area. *See* rec. ex. vol. I at 49; rec. ex. vol. V at 60. These areas probably have few, if any, elementary students; thus from a practical perspective, the Quinton Heights area is not as long as it may appear because its southernmost area is occupied by large institutions. Merely because the balance of the school's attendance boundaries includes minority population, or that the school includes Topeka Avenue or railroad tracks, does not compel a conclusion that the boundaries were drawn with segregative intent or effect. *See* rec. vol. III at 291-92 (Mr. Lamson commenting about undesirable configuration of attendance area). Indeed, the presence of natural barriers in elementary attendance areas is hardly unique in this system. *See* rec. ex. vol. V at 225-228 (listing 20 elementary schools with natural barriers, e.g. institutional spaces, major thoroughfares, waterways, railroad tracks).

The court's earlier discussion of "peculiar-looking attendance boundaries" is peculiar in itself because, like the court's subjective approach to map reading, the

court of appeals has moved far beyond its review function into the realm of a trial court. Court's Opinion at 69 [App. 75-76b]. Still, based on this untethered perception of "peculiarity," the court declares that Quinton Heights' current boundaries are segregative. *Id.* Put simply, the court seeks to overturn the district court's factual finding that the attendance zones are not gerrymandered. *Brown*, 671 F. Supp. 1300. Notwithstanding the countless hours spent on this case by the panel, I remain firmly convinced that we have added very little to the district court's amply supported findings. Admittedly, the evidence is not perfectly consistent and all in defendants' favor. But it is not nearly so one-sided or in favor of the plaintiffs' as this court apparently believes. The trial judge had a firm grip on the applicable law and a superb command of the facts in this complex case. We have done no better, even assuming that we were so empowered.

F.

Notwithstanding that Lowman Hill Elementary began as an all-white *de jure* school, this court finds that "[t]he school appears to have been designed and maintained as a school with a concentration of minority students." Court's Opinion at 80 [App. 87b]. The court begins by describing plaintiffs' contention

concerning optional attendance zones, *see* Appellants' Brief at 13 n.20; rec. supp. vol. XI at 96-98; vol. III at 235-41; however, it is unclear whether the court accepts those contentions, in light of the district court's rejection of those same contentions. Court's Opinion at 79-80 [App. 86b]; *see Brown*, 671 F. Supp. at 1298 (optional attendance zones (all eliminated in 1976) did not have significant segregative effect; any effect attenuated). The emphasis of this court seems to be on the inclusion of two areas that have greater concentrations of black residents[49] in the northwestern part of central Topeka, within the Lowman Hill attendance boundaries. The district court pointed out that these two areas "are closer to the Lowman Hill Schools than other schools in the area." *Brown*, 671 F. Supp. at 1301. Indeed, that was the observation of

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[49] The court tells us that Lowman Hill "remains the school whose attendance boundaries include the only significant group of *minority* population in the northwestern quarter of the school district," and also discusses Lowman Hill as containing "the only two significant areas of *minority* population in that part of Topeka." Court's Opinion at 70, 80 [App. 76-77b, 86-87b] (emphasis added). As support for its finding, the court refers to the same map discussed above which indicates percent black population by block. *Id.* at 80 n.91 [App. 87b n.91]. Again the court's statement is too broad, we really have no way of knowing the concentration of other *minority* groups (e.g. hispanic) in the Lowman Hill area.

defendants' expert Dr. Clark.[50] Rec. vol. XI at 2344-

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[50] In footnote 62, Court's Opinion at 52 [App. 58b], the court claims that defendants' expert Dr. Clark admitted that the Lowman Hill boundaries were drawn with the effect of encompassing the black population in northwestern central Topeka, and that he essentially threw up his hands claiming that the boundaries already "*were*" in place. If this was true, it might provide some support for this court's finding that the Lowman Hill boundaries were drawn with the intent or effect of segregating the black elementary students in northwestern central Topeka. The transcript of Dr. Clark's testimony does not support that account, however. Dr. Clark explained why his work concerning schools with larger concentrations of minority students (including Lowman Hill) depended upon a more detailed analysis than a visual inspection of attendance areas would permit. Concerning Lowman Hill, the following exchange occurred:

> Mr. Hansen: But this is an example where on visual analysis the boundaries were drawn in such a way -- from visual analysis the boundary [sic] were drawn in such a way as to incorporate virtually all the black people in that part of town into one school in that part of town. Isn't that right?
>
> Dr. Clark: No, I don't think they were drawn to incorporate all the black people in that part of town. There are areas of yellow [indicating lesser concentrations of black residents] that *are* outside that. But the boundaries of those school districts are in place; and yes, they have substantial numbers of black people. As I said earlier in the direct testimony, I took all those areas which were substantially black, and under racial transition for more detailed analysis.

Rec. vol. XI at 2345 (emphasis added). Taken in context and without the benefit of the court's creative editing, e.g. changing "are" to "were," the

(continued...)

45.

In 1959, a new and expanded Lowman Hill school was constructed which received black students from Buchanan. Rec. supp. vol. XI at 92. This increased Lowman Hill's minority percentage to 49.63% by 1966, but the school has never had a majority-minority population.[51] *Brown*, 671 F. Supp. at 1301. The

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[50](...continued)
above is hardly the admission that the court would cast it to be. But this court's approach to Dr. Clark's testimony has not been one of balance. *See, e.g.*, Court's Opinion at 55 [App. 61b] (out of 8 potentially segregative cases concerning boundary changes, Dr. Clark concludes that all are "overall desegregative or generated by demographic trends," rec. ex. vol. I at 43, yet this court discusses the one case concerning a now-closed school which could be considered partly demographic and partly segregative).

[51]

Racial Inventory-Lowman Hill Elementary
1953-1985

Year	Minority	White	Total	%Minority
1953	0	292	292	0
1954	0	274	274	0
1955	46	242	288	16.0
1956	53	251	304	17.4
1966-67	199	202	401	49.63
1967-68	184	245	429	42.89
1968-69	174	210	384	45.31
1969-70	186	219	405	45.93
1970-71	157	222	379	41.42
1971-72	164	198	362	45.30
1972-73	140	193	333	42.04
1973-74	133	151	284	46.83
1974-75	127	143	270	47.04
1975-76	137	167	304	45.07

(continued...)

district court gave very close attention to this school and its relationship to surrounding schools.

This court mentions the closings of three surrounding schools and complains that these closings "did not affect the minority student percentage at Lowman Hill." Court's Opinion at 69 [App. 76b]. The court then provides the answer to "why not?" when it tells us that "the student population it [Lowman Hill] acquired was apparently of the same makeup as its existing population." *Id.* at 80 [App. 87b]. The answer is not surprising when one compares the minority percentages of the schools that closed in relation to Lowman Hill.

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[51](...continued)

1976-77	143	155	298	47.99
1977-78	117	159	276	42.39
1978-79	99	144	243	40.74
1979-80	113	149	262	43.13
1980-81	151	196	347	43.52
1981-82	145	202	347	41.79
1982-83	120	207	327	36.70
1983-84	134	203	337	39.76
1984-85	127	214	341	37.24
1985-86	155	215	370	41.89

Rec. supp. vol 11 at 56, 57, 58, 59; ex. vol. IV at 54, 58, 62, 66, 70, 74, 78, 82, 86, 90, 93, 97, 101, 105, 109, 124, 136, 148, 160 & 172.

Year	School Closed	Minority % Year Closed	Lowman Hill Minority % Year Other School Closed
1975	Clay	25.35	47.04
1979	Polk	48.00	40.74
1980	Central Park	42.90	43.13%

Rec. ex. vol. IV at 86, 101, 105. The above chart indicates that the schools that were closed were very similar in minority concentration to Lowman Hill. If anything, the presence of racially similar neighboring schools that were ultimately closed undercuts the court's finding that Lowman Hill is racially identifiable and used to concentrate minorities.

Looking at the neighboring schools and their racial composition in 1985 hardly compels the conclusion that Lowman Hill is racially identifiable.

School	Direction from Lowman Hill	1985-86 Minority %
Lowman Hill		41.89
Quinton Heights	SE	49.43
Randolph	SW	14.81
Gage	NW	9.43
Potwin	N	7.73
Sumner	NE	31.47

Rec. ex. vol. I at 49B; rec. ex. vol. IV at 170, 173-74. It should be pointed out that nearby Quinton Heights had a higher minority percentage than Lowman Hill. The district court recognized that although several surrounding schools had a lower minority percentage, this alone did not require it to conclude that the actions of the school board resulted in a segregative effect. *Brown*, 671 F. Supp. at 1301. It noted that Lowman Hill was centrally located and had stable boundaries over time. *Id.* Perhaps if this court had *de novo* review, the panel majority would come to a different conclusion, but on these very mixed facts the district court's call was certainly not clearly erroneous.

G.

The court next shifts to "primarily white schools," as racially identifiable. These apparently are schools which this court has determined should have greater minority enrollments, both in the past and the future.[52]

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[52] Concerning Gage (9.4% minority) and Potwin (7.7% minority), this court tells us that "the district court specifically found that they have been predominantly white schools since the Supreme Court's decision in this case, and remain predominantly white schools adjacent to schools with higher-than-average minority student population." Court's Opinion at 51 n.60 [App. 57b n.60] (citing *Brown*, 671 F. Supp. at 1303). While the district court apparently considered Gage and Potwin "schools with low minority percentages," I simply cannot find, on the page cited by the court, any finding that *these schools* "remain predominantly white schools adjacent to schools with higher-than-average minority student population." Court's Opinion at 51 n.60 [App. 57b, n.60]. Lest the wrong impression be given, that Gage and Potwin are totally surrounded by schools with higher-than-average minority concentrations, perhaps creating an inference of segregative intent including non-compliance with the board's affirmative duty, it is necessary to view the racial composition of those schools in relation to schools with neighboring attendance areas. Regarding Gage:

[52](...continued)

School	Direction from Gage	1985-86 Minority %
Gage		9.43
Lowman Hill	SE	41.89
Randolph	SE	14.81
Whitson	SW	10.22
McCarter	SW	9.16
Potwin	NE	7.73

Rec. ex. vol. I at 49B, ex. vol. IV at 170, 172-74. Thus, only Lowman Hill has a higher-than-average minority concentration (avg. minority concentration 26.36%).

Regarding Potwin:

School	Direction from Potwin	1985-86 Minority %
Potwin		7.73
Sumner	SE	36.36
Lowman Hill	SW	41.89
Gage	SW	9.43
Quincy	NE	20.54

Rec. ex. vol. I at 49B, ex. vol. IV at 170, 172-74. Thus, only Sumner and Lowman Hill have higher than average minority concentrations.

The district court noted that schools with low minority percentages located in the western part of the district are expected to increase in minority enrollment if current trends continue. *Brown*, 671 F. Supp. at 1303-04.

Court's Opinion at 81-82 [App. 87-88b]. These schools purportedly have an identity as "schools for white children," *id.* at 82 [App. 89b], which I suspect can only be changed to the court's satisfaction by strict racial balancing, regardless of the *de facto* reasons for their current racial composition. The purpose of desegregation law is to wipe out the effects of the prior *de jure* system, not to eliminate every difference in racial composition between schools. *See supra* p. 48-52 [App. 57-62c]. Moreover, many of these schools have experienced increases in minority percentages as a result of residential movement. *Brown*, 671 F. Supp. at 1303-04. Despite this court's clear view that positive changes in racial composition due to demographic factors are not relevant to determining whether the vestiges of a prior *de jure* system remain, *see* Court's Opinion at 53, 56 [App. 59b, 62b], one would expect that a school district operating a dual system would have taken action to oppose or modify the effects of trends. That is not what has happened in Topeka. *Brown*, 671 F. Supp. at 1304.

Concerning the location of new schools, this court makes the following statement which could give the wrong impression:

> All of the elementary schools and all but one of the secondary schools opened by the school district since *Brown II* were built in the white outer part of the district. Robinson middle school, which serves the central part of Topeka, is the sole exception. Furthermore, many of these schools were built near to the edges of the district.

Court's Opinion at 71 [App. 78b]; *see also id.* at 54 [App. 60b]. The judgment in *Brown II* was announced May 31, 1955. To be sure, numerous schools were opened in the western part of the district and had substantial white enrollments. The district court identified these as:

> McClure, Sheldon, McEachron, McCarter, Bishop and Hudson elementary schools, as well as Jardine [1961], Eisenhower [1961] and Landon Junior High Schools [1963] and Topeka West Senior High School [1961]. These schools were in areas of residential expansion. During the same period, new schools with mixed racial compositions replaced existing facilities at Lowman Hill,

Lafayette, Highland Park Central, Central Park and Belvoir elementary schools.

Brown, 671 F. Supp. at 1299; rec. supp. vol. XI at 194, 225. It should be added that Quinton Heights was replaced in 1954. Rec. supp. vol. XI at 40, 50. Thus, several schools which were not on the outer edge of Topeka were included in the district's new school construction during and subsequent to the mid-50's: Lowman Hill, 1959; Quinton Heights, 1954; Lafayette, 1956; Highland Park Central, 1965; Belvoir, 1967; Central Park, 1967. *Brown*, 671 F. Supp. at 1299; rec. supp. vol. XI at 40, 43, 50, 92, 166, 170.

Based on its erroneous finding that Topeka's neighborhood school plan resulted only in the construction of schools for white children in the far reaches of the district, thereby increasing segregation, the court tells us that "[a] school district conscious of its constitutional duty would have attempted to counteract that effect." Court's Opinion at 72 [App. 79b] (citing *Diaz*, 733 F.2d at 667-69); *see also* Court's Opinion at 28 and 28 n.31 [App. 30b, 30b n.31] (endorsing "castigation" approach). Although *Diaz* contains helpful language that a neighborhood school policy must be carefully analyzed as to application and enforcement before constitutional liability may be imposed, 733 F.2d at 664, the case is both legally and factually distinguishable. The duty of the school board

in *Diaz* was different than that of these defendants; clearly established California state law required affirmative action to relieve segregation, regardless of the cause. *Diaz*, 733 F.2d at 666-67. Moreover, according to the majority in *Diaz*, the board failed to consider state guidelines and rejected alternatives which would have enabled it to comply with its duty. *Id.* at 669. That is not what occurred here. Noticeably absent from the plaintiffs' evidence is any complaint to the school board or the district court, when the school construction in question occurred.

Finally, I come to Topeka West High School, built in 1961 and considered by plaintiffs and the court[53] as "the quintessential example of deliberate channeling of white students to schools in the western part of the school district." Court's Opinion at 81 [App. 88b]; *see also id.* at 71 [App. 78b] (plaintiffs/court finding "that Topeka deliberately placed new schools as far as possible from minority residential areas in order to polarize the district into white outer and minority inner schools."). Once again, this court's focus on "deliberate" conduct is inconsistent with its criticism of

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[53] For some reason, perhaps to lessen the appearance of its factual overinvolvement, the court constantly describes (and refines) the contentions of the plaintiffs (while ignoring those of the defendants) and then makes its factual findings, affirming the plaintiffs' contentions. *See* Court's Opinion at 65, 71-74, 78 [App. 72b, 78-81b, 85b]; *see also id.* at 54-55 [App. 61b].

the district court for considering intent. Although this court criticizes the location of the school, which is near the western edge of the district, there were valid reasons, which have been discussed elsewhere, for placing the school in that location. *See supra* p. 64-65 [App. 78-79c]; *see also Brown*, 671 F. Supp. at 1300. The notion that Topeka West was built to channel white students from Topeka High, as contended by the plaintiffs, is not supported by the facts. In 1961, Topeka High was a winner of the prestigious Bellamy Award. Rec. vol. X at 1500. But it was overcrowded with 2,300 students. Rec. vol. IX at 1442-43. Topeka West opened with 700 students the first year, 900 the second, 1100 the third and continued to grow until 1969 when part of the attendance area was transferred back to Topeka High. *Id.* at 1434. Topeka High led high school enrollment totals for several years after the opening of Topeka West. Like Topeka High, Topeka West has won a prestigious award: Topeka West was designated a National School of Excellence recently, rec. supp. vol. V at 1622-23. Topeka West has had increased minority enrollment over the years as the

western portion of Topeka becomes more residentially integrated.[54]

H.

In addition to school openings, the court has undertaken to overturn the district court's finding that,

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Racial Inventory-Topeka West High School
1966-1985

Year	Minority	White	Total	%Minority
1966-67	5	1,241	1,246	0.40
1967-68	7	1,414	1,421	0.49
1968-69	10	1,552	1,562	0.64
1969-70	10	1,626	1,636	0.61
1970-71	9	1,580	1,589	.57
1971-72	9	1,567	1,576	.57
1972-73	18	1,522	1,540	1.17
1973-74	19	1,485	1,504	1.26
1974-75	35	1,421	1,456	2.40
1975-76	31	1,399	1,430	2.17
1976-77	31	1,355	1,386	2.24
1977-78	39	1,299	1,338	2.91
1978-79	57	1,286	1,343	4.24
1979-80	63	1,248	1,311	4.81
1980-81	70	1,505	1,575	4.44
1981-82	77	1,391	1,468	5.25
1982-83	95	1,388	1,483	6.41
1983-84	97	1,363	1,460	6.64
1984-85	112	1,388	1,500	7.47
1985-86	120	1,391	1,511	7.94

Rec. ex. vol. IV at 57, 61, 65, 69, 73, 77, 81, 85, 89, 91, 95, 99, 103, 107, 111, 128, 140, 153 & 164 & 176.

on the whole, school closings were "an integrative device." *Brown*, 671 F. Supp. at 1299. Again, the court takes shelter in describing the plaintiffs' contention: "that school closings of highly segregated schools were not desegregative in practice because the school district simply reassigned the students at those schools *en masse* to a nearby school which then took over the segregated status of the school closed." Court's Opinion at 73 [App. 80b]; *see also supra* note 53. The court then adopts this as its finding: "The evidence supports this contention for the 1950s and 1960s." Court's Opinion at 73 [App. 80b]. Regarding the 1970's on the whole, the court tells us that most closings were not segregative or desegregative. *Id.*

In its section on school closings, the district court mentioned 13 closings by name. *Brown*, 671 F. Supp. at 1299. I have discussed several closings in the context of this dissent and see no reason why the district court should be overturned. This court's one paragraph summary analysis of school closings, while giving the appearance of completeness, does not facilitate my review. I cannot respond to the court's position without knowing which closings are covered by its findings and why.

VIII.

The district court recognized that the plaintiffs "hinge their case on this absence of racial balance in all schools and the failure of the defendants to promote racial balance." *Brown*, 671 F. Supp. at 1295.

> At any time, more could have been done to achieve racial balance in the schools. But, it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday. More should be done to improve racial balance in the schools if the existing imbalance follows from defendants' past intentional segregative conduct.

Id. at 1309. Thereafter, the district court found that the present racial imbalance does not derive from "the *de jure* system or a foot-dragging segregationist policy." *Id.*

In 1985-86, Topeka had *no* one-race or virtually one-race minority schools. Whether we look at percentages or absolute numbers, the district court was not clearly erroneous in deciding that the Topeka system was not currently segregated. Of 34 schools, only three had majority-minority populations. *Brown*, 671 F. Supp. at 1294. Those three schools (Belvoir, 146 minority students (ms); Lafayette, 217 ms; and

Highland Park North, 179 ms) served 542 minority elementary students or one-quarter of the minority elementary population (2,141 ms). *See* rec. ex. vol. IV at 170, 171, 174; Court's Opinion at 61 [App. 67b]. Five elementary schools (Crestview, 32 ms; Gage, 25 ms; McCarter, 35 ms; McClure, 23 ms; Potwin, 18 ms) had 90+% white enrollment, yet they served 6.2% of the minority elementary population. *Id.* at 170, 172, 174. Two of the middle schools which are now combined (French, 241 white students (ws); and Landon, 205 ws) served 31 percent of the white middle school population (1,446 ws); while serving 6.95% of the minority middle school population (37 ms/532 ms). *Id.* at 175-176. At the high school level, Topeka West had a 90+% white enrollment, serving 41.6% (1391 ws/3349 ws) of the white high school population, but also serving 11.48% (120 ms/1045 ms) of the minority high school population. *Id.* at 176-77. Though this court views the evidence differently, I submit that the district court's finding is supported by these numbers, when considered on this record, and looking back to the prior years. *See supra* text accompanying notes 9-13; *see also supra* note 18.

Although the court repeatedly tells us that racial balancing is not the objective, the court does acknowledge that "numbers are usually the focus of desegregation plans." Court's Opinion at 85-86 [App. 93b]; *see also id.* at 20 [App. 21-22b]. Without

question, numbers resulting in better (strict) racial balance are the only remedy for what the court perceives as "schools that are now and always have been white, schools that are now and long have been heavily minority, and others." Court's Opinion at 87 [App. 95b]. The court seems to be leaning toward replication of the system-wide minority average in every school when it indicates that even compliance with a ±15% standard for student assignment would be insufficient. Court's Opinion at 85 [App. 92-93b]. In the words of this court:

> Dr. Foster also pointed out that such an approach would move schools now just beyond the 15% range to just within it, an improvement he did not find greatly desegregative as would preserve the existence of schools differing by as much as 30% in their minority percentage and thus still marked as minority or white schools.

Id. (footnote omitted). The inherent nature of a ±15% standard for student assignment means that some schools may vary by as much as 30%, though many probably will not. My research has not disclosed any court finding that compliance with a ±15% standard as to student assignment was indicative of a current condition of segregation.

When one looks carefully at the most recent data we have on student assignment, *see supra* note 18, while considering the racial composition of this system (74% white), this court's views are unique, given the wide distribution of minority students throughout the system and the absence of one-race minority schools. Indeed, several courts reviewing desegregation plans have given effect to the language in *Swann* that some "one-race, or virtually one-race, schools within a district [are] not in and of [themselves] the mark of a system that still practices segregation by law." 402 U.S. at 26. *See, e.g., Morgan*, 831 F.2d at 323 (Boston system with majority-minority student enrollment unitary; there was "substantial degree of integration" despite several schools with 80%+ enrollments of one race and several schools out of compliance with court-ordered desegregation plan); *Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975) (Atlanta system with 85% black enrollment unitary; 92/148 schools 90%+ black); *Ross v. Houston Indep. School Dist.*, 699 F.2d 218, 219, 226 (5th Cir. 1983) (Houston system with 74% minority enrollment unitary; 55/226 schools were 90%+ black and 2 schools all white). I submit that the presence of some predominantly white schools in this system and three schools which have a slight majority of minority students does not violate the equal protection clause. *Washington*, 426 U.S. at 240 (predominantly one-race schools not alone violative of equal protection).

Because the numbers are not indicative of a current condition of segregation, and the testimony relied upon by the district court supports the very opposite, it becomes necessary for the court to engage an unyielding presumption against the Topeka system from the outset. The court simply has jumped the gun in invoking the *Keyes* presumption to arrive at the preliminary and critical conclusion that there is a current condition of segregation in Topeka. Nowhere is this more evident than in footnote 61, Court's Opinion at 51 [App. 57b], when the court explains that its discussion of the current condition does not conflict with the district court's conclusion that there is no unlawful segregation in Topeka. This court reasons that because the district court "did find the existence of racial disparities in school enrollment and staff/faculty assignment," it should have immediately invoked a presumption against Topeka: "Our disagreement with the district court is chiefly on the significance of these findings in a district with Topeka's history, and bearing the weight of a presumption against it which the district court failed to accord." Court's Opinion at 51 n.61 [App. 57b n.61]. This court's understanding of the district court's findings differs from mine. *See supra* p. 60-67 [App. 72-81c]. But even granting the comparatively small departure from perfect racial balance in this system, Topeka's history is one factor, among many, that a court may consider in deciding whether the presumption should be invoked. "While

that history of discrimination cannot and should not be ignored, it 'cannot in the manner of original sin, condemn governmental action that is not itself unlawful.'" *Riddick*, 784 F.2d at 539 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion by Justice Stewart)). To *require* perpetual application of the presumption would mean that no school district which had a *de jure* system in 1954, could ever be free of the presumption and achieve unitary status. The requirement of a current condition of segregation resulting from past or present segregative intent (as opposed to segregation resulting from voluntary demographic change), prior to the operation of the presumption, allows a school system to redeem itself and, one day, be free of federal court supervision. *See Riddick*, 784 F. 2d at 538-39 (rejecting argument "that the Norfolk school board must continue to justify all of its actions because of the history of segregation."). That day should come for U.S.D. 501 in Topeka.

Alternatively, even if the presumption applies, the school board may adduce proof that the effects of past segregative intent have attenuated completely. *Keyes*, 413 U.S. at 211. This was recognized in *Dayton II* when the Court indicated that the Dayton school board "had failed to come forward with evidence to deny 'that the current racial composition of the school population reflects the systemwide impact' of the Board's prior discriminatory conduct." *Id.* 443 U.S. at 537-38

(quoting *Brinkman*, 583 F.2d at 258). Here, "the Board was given ample opportunity to counter the evidence of segregative purpose and current, systemwide impact," *Columbus*, 443 U.S. at 467-68, and such evidence was credited by the district court.

In repeatedly castigating the defendants for noncompliance with the affirmative duty, the court relies upon the same incomplete approach that plaintiffs' expert took--not considering regional and local migration and other demographic factors which necessarily influence school board decisions. *See* rec. vol. IV at 510-511. For example, the court criticizes the defendants for building new schools in the late 1950's and 60's to accommodate population growth in western Topeka and concludes that "the erection of so many schools devoted to educating white children had a significant segregative effect on the district."[55] Court's Opinion at 72 [App. 78-79b]. In arriving at this conclusion, the court apparently relies upon the following: "With respect to the new schools themselves, [the plaintiffs] argue that Topeka should have taken advantage of the underutilized inner schools; that is, that Topeka should have voluntarily bused white children from outer Topeka to the inner city schools

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[55] The court's choice of words is unfortunate because the clear implication of the court's reference to "schools devoted to educating white children," is that Topeka was unconcerned with educating minority children. The court's implication is not supported by the record.

instead of putting up new buildings." Court's Opinion at 71 [App. 78b]; *see also* rec. supp. vol. XI at 158-72 (Lamson theory). It is one thing to theorize that students could have been bused to a slightly underutilized seven grade (K-6) elementary school (e.g. Lowman Hill with an average of 43 spaces unused from 1957-66, or Quinton Heights with 28 spaces unused in 1966), but it is quite another to match the grade levels of spaces available each year with the grade levels of a hypothetical group that would be assigned to the school annually. *See* rec. vol. IV at 448-49 (underutilization analysis did not consider grade level of students); vol. X at 1538-41; supp. vol XI at 169. Moreoever, this suggestion ignores the complaint that HEW had in 1974 concerning educating students in older schools. *See supra* p. 38 [App. 45-46c].

Another of the administrative possibilities suggested by Mr. Lamson to improve racial balance would have been to combine Highland Park Central and Highland Park South in 1968, and build a school between the two. This proposal would have entailed abandoning two existing buildings with large enrollments, and the expense of building a new school. Rec. vol. X at 1475-76. The combined enrollment of the new school would have been 1,334 students, something which has never occurred in Topeka, and what deputy superintendent Henson thought was "too large an elementary school for this community or any

community." *Id.*; rec. vol. IV at 512-13; *see also* supp. vol. XI at 170. Moreover, in suggesting alternatives for the 1950's and 1960's decisions concerning elementary boundaries, some of these alternatives would have required busing and lunch provisions for students, but Mr. Lamson did not consider that the Topeka system lacked a hot lunch program until the mid-60's. Rec. vol. IV at 443-448, 510; supp. vol. XI at 34-35, 56.

Unfortunately, one could get the wrong impression concerning the board members' attitude about desegregation. This court seems to fault the board members for not testifying that they regularly took desegregation concerns into account. Court's Opinion at 64 [App. 70-71b]. I do not read their testimony as precluding such concerns. Mr. Dennis C. Payne, board member from 1957-65, explained that the neighborhood concept was in keeping with the desegregation required by *Brown* because, previously, black children were not allowed to attend the schools closest to their homes. Rec. vol. XII at 2417 ("So we felt the neighborhood concept was what everybody wanted and what we wanted."). Mr. Payne testified to an absence of gerrymandering for racial segregation. *Id.* He also testified that he was aware of white flight due to the original four step plan and adherence to the neighborhood school plan. This court quotes his response: "What could we do? We can't make people move, no way." *Id.* at 2423 (quoted in Court's

Opinion at 64 [App. 71b]). Considering the time period to which this statement refers, and the school district's then-recent adoption of a plan which met with the approval of this court, I would suggest that the school board could not prohibit people from moving, although perhaps it could have changed the consequences of a move with respect to school assignment. *Cf. Ross*, 699 F.2d at 225 (when district has successfully implemented plan to achieve unitary status, there is "no affirmative fourteenth amendment duty to respond to the private actions of those who vote with their feet").

Mr. Joe Douglas, Jr., the fire chief of the City of Topeka, and a board member from 1977-85 (board president for two years), testified that he and the other black member of the board opposed the open enrollment plan, which was adopted due to pressure from working parents who wanted their children to attend schools close to day care arrangements. Rec. vol. XII at 2441; *see* Court's Opinion at 64 n.81 [App. 71b n.81]. The plan was soon discontinued because of its effect on minority percentages. Rec. vol. XII at 2442-43. It was replaced by a majority to minority transfer plan.[56] *Id.* at 2443-44; *Brown*, 671 F. Supp.

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[56] Perhaps because there was no evidence concerning "vigorous official encouragement of desegregative transfers" this court views the majority to minority plan as "minimally effective" and as "a slightly desegregative transfer plan that potentially could be significant." Court's Opinion at 31, 83, 83

(continued...)

at 1298. While he was on the board, Mr. Douglas advocated that no school in the district should exceed 50% minority, but the fact that some schools exceeded that percentage was not indicative of segregation, which he termed "as in the eye of the beholder." Rec. vol. XII at 2454-55. Contrary to the court's assertion that board members did not consider desegregation concerns, Mr. Douglas testified that the school board that he served on "took as a priority the lowering of minority percentages."[57] *See* Court's Opinion at 64

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[56](...continued)
n.97, 63 [App. 34b, 90b, 97-98b n.97, 70b]. Nonetheless, the Supreme Court has endorsed such plans, *see Swann*, 402 U.S. at 26-27, and it is unclear what feature of the plan this court objects to, particularly considering the lack of evidence on this point at trial. *See* Court's Opinion at 82 [App. 89b] ("The feasibility of further measures was not a focus of this case, and there was little evidence on this question.").

[57] Mr. Douglas was asked the following question on direct concerning the goal of eliminating majority-minority schools in the Topeka system:

> Mr. McAtee: The fact that that goal has not yet been achieved or does not exist today in this district, Mr. Douglas, is that an indication to you that actions of this Board of Education present and past or inactions of the Board of Education present and past have been undertaken with an intent to achieve a segregative effect?

(continued...)

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[57](...continued)

Mr. Douglas: I certainly do not believe that and I have no knowledge of any such actions or inactions by the board. I certainly believe at this particular point in time that this district is not in noncompliance or is outside the law and I don't really feel that the district needs the ACLU or anyone else to mandate any directives as to what should be done in this district and that includes, if I may say so respectfully, this court. I think that the board has clearly exhibited, at least I know for the eight years that I was there and in looking at and listening to what had happened previously, it certainly is indicative to me that the board has faced up to the problem and one of the kinds of things that they feel that they could do. I don't think that anything is perfect. I'm certainly not perfect, but I don't think I want to throw me away or I'm not going to go have myself made over because I'm not perfect. I hope that I have a little time to continue to improve myself and that's the same way that I see the district and with all of the problems that are facing education today, there's an old adage that I think is really appropriate for this particular situation. It goes, while standing knee deep in alligators, it is sometimes difficult to remember that your original reason for being there was to drain the swamp, and if you serve on a Board of Education today with all the myriad of problems that comes before you, I think it's commendable that this board has taken as a priority, at least the board that I was on, took as a priority the lowering of minority percentages and the monitoring of those situations that could cause those problems.

Rec. vol. XII at 2455-56.

[App. 70-71b]; rec. vol. XII at 2456. The current superintendent of schools, Dr. Edwards, supported the commitment to improve the racial composition of the schools. Rec. vol. XII at 2530.

During trial, there was testimony about concerns identified by the National Commission on Excellence in Education which prepared *A Nation at Risk*. Rec. supp. vol. VII at 1996-99. The Commission emphasized that improved education is essential not only to assure that the United States will remain competitive internationally, but also to assure "the intellectual, moral and spiritual strengths of our people which knit together the very fabric of our society." National Commission on Excellence in Education, *A Nation at Risk: The Imperative For Educational Reform*, at 7. It appears that Topeka has heeded the call to provide "all, regardless of race or class or economic status, . . . a fair chance and . . . the tools for developing their individual powers of mind and spirit to the utmost," for "individuals in our society who do not possess the levels of skill literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life." *A*

Nation at Risk at 4, 7. "No person of goodwill toward his fellow man can logically argue" with the naturally correct premise of *Brown I*: equal educational opportunity in a unitary system for all children regardless of race. *Keyes v. School Dist. No. 1*, 521 F.2d 465, 490 (10th Cir. 1975) (Barrett, J., concurring), *cert. denied*, 423 U.S. 1066 (1976). But neither this court's opinion nor the record convinces me that the equal opportunity and benefits provided to all by Topeka's neighborhood schools will be improved by the protracted federal court supervision which is sure to follow at the expense of valued local control.[58] *See Milliken I*, 418 U.S. at 741 (recognizing virtues of local control of public education).

Like the district court, I do not think that the constitutional command to eliminate the dual system goes unheeded 35, or even 30, years after *Brown I*. Within that time, tremendous demographic and social change has affected Topeka and its school system. The

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[58] Although the court is impressed with magnet schools to attract white students, *see* Court's Opinion at 83-84 n.97 [App. 90-91b n.97], and voluntary transfers to improve racial balance, it is most unlikely that these techniques can produce the type of racial balance so essential to the court's decision. *See* F. Welch & A. Light, *supra* note 27, at 23-25, 57 [App. 102c n.27] (smallest decrease in dissimilarity index associated with magnet programs); *see also* J. Hochschild, *The New American Dilemma-Liberal Democracy and School Desegregation* 70-79 (1984); L. Hughes, W. Gordon & L. Hillman, *Desegregating America's Schools* 17-20 (1980).

school board has demonstrated concern for improving the racial composition in the Topeka schools while retaining the neighborhood school concept. In some cases, the two are not compatible, but in this system substantial integration has been achieved, and the system is now unitary, although not perfect. Because I am not persuaded of a remaining constitutional violation, and I am persuaded that the appellate court has retried the case for a different outcome, I would affirm the district court's judgment declaring the Topeka system unitary at last.[59] *Brown*, 671 F. Supp. at 1311.

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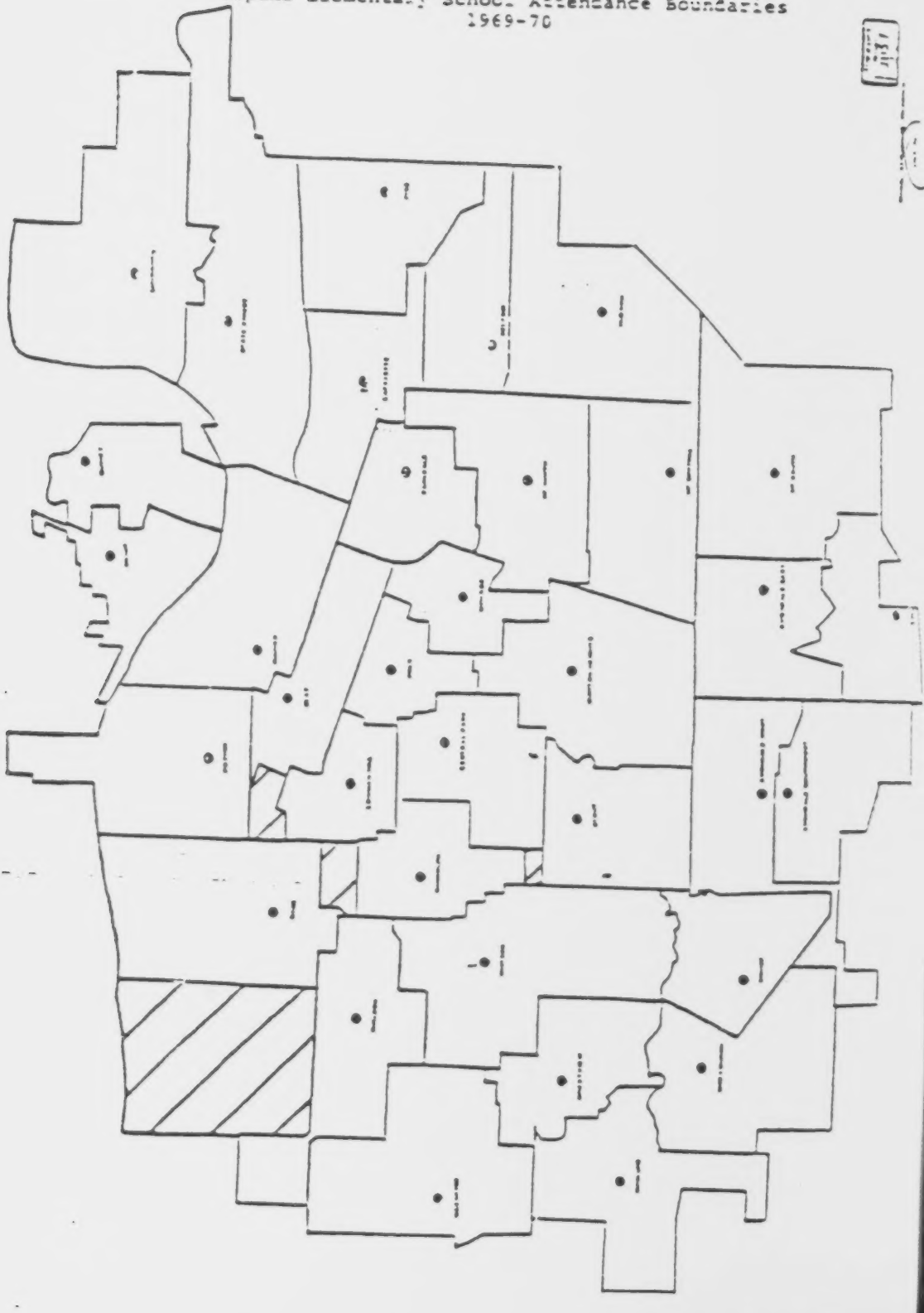
[59] Accordingly, I would affirm the district court's judgment insofar as denying relief under Title VI. I concur in this court's judgment insofar as it affirms the dismissal of the Governor and the state board of education defendants from this action. *See* Court's Opinion at 90 [App. 97b] ("We affirm both of these rulings.").

Appendix A
Topeka Elementary School Attendance Boundaries
1969-70



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Appendix B
Topeka Elementary School Attendance Boundaries
1985-86

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APPENDIX D

Supreme Court of the United States

No. 89-1681

Board of Educaton of Topeka, Shawnee County, Kansas,
Petitioner,

v.

Oliver Brown, et al.

ON WRITE OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Freeman v. Pitts*, 503 U.S. ___ (1992) and *Board of Education of Oklahoma City Public Schools, Independent School District No. 80, Oklahoma County, Oklahoma v. Dowell*, 498 U.S. __ (1991).

IT IS FURTHER ORDERED that the petitioner, Board of Education of Topeka, Shawnee County, Kansas, recover from Oliver Brown, et al., Three Hundred Dollars ($300.00) for its costs herein expended.

April 20, 1992

Clerk's costs: $300.00

APPENDIX E

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
and	)	
	)	
CHARLES SMITH and KIMBERLY SMITH, Minor Children, By Their Mother And Next Friend, LINDA BROWN SMITH, et al.,	)	No. 87-1668
	)	
Intervening Plaintiffs/ Appellants,	)	
	)	
v.	)	
	)	
BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, et al.,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. T-316)

Christopher A. Hansen (Richard Jones, Charles Scott, Jr., and Joseph Johnson with him on the brief), American Civil Liberties Union Foundation, for Plaintiffs-Appellants.

Dan Biles, of Gates & Clyde, Overland Park, Kansas, Carl Gallagher, Assistant Attorney General, Topeka, Kansas, and K. Gary Sebelius (Ann L. Baker, Charles D. McAtee and Charles N. Henson with him on the brief) of Eidson, Lewis, Porter & Haynes, Topeka, Kansas for Defendants-Appellees.

Before McKAY, SEYMOUR, and BALDOCK, Circuit Judges.

SEYMOUR, Circuit Judge.

More than three years ago, we reversed the district court's decision in this landmark school desegregation case. *Brown v. Board of Education.*, 892 F.2d 851 (10th Cir. 1989). The Supreme Court recently vacated our lengthy opinion, *Brown v. Board of Educ.*, 112 S. Ct. 1657 (1992), remanding for further consideration in light of *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991), and *Freeman v. Pitts*, 112 S.Ct. 1430 (1992). After oral argument and due consideration of *Dowell* and *Freeman*, we reinstate our prior opinion in full, which the additions set out below.[1]

I.

On remand we are required to determine whether the recent Supreme Court authority has altered the landscape of desegregation law so as to change our prior opinion. We reversed the district court in part because it "erred in placing the burden on plaintiffs to prove intentional discriminatory conduct rather than according plaintiffs the presumption that current disparities are causally related to past intentional conduct."[2] *Brown*, 892 F.2d at 854. In its opinion, the district court wrote that, "after 30 years, one cannot assume that the racial imbalance which remains is a vestige of the *de jure* system or other illegal segregation."

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[1] We do not address the district court's Title VI holding, its dismissal of the Governor of the State of Kansas, or its ruling that the State Board of Education bears no liability for segregation in Topeka's schools. Each of these issues is resolved by our prior opinion.

[2] After a review of the record, we also held clearly erroneous the district court's findings that the school system had reached unitary status in student assignment and faculty and staff assignment practices.

Brown v. Board of Educ., 671 F. Supp. 1290, 1297 (D.Kan. 1987). In *Freeman*, the Supreme Court said simply: "The *school district bears the burden of showing* that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." 112 S. Ct. at 1447 (emphasis added). *See also Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir. 1992). *Freeman* thus explicitly reaffirms one of the principles that required our reversal of the district court. The Court further held that a court may relinquish supervisory control over a former de jure school system in an incremental manner. *Freeman*, 112 S. Ct. at 1445.

Dowell underscored the equitable nature of the desegregation decree, and indicated that the term "unitary" has no magical import. 111 S. Ct. at 635-36. Our prior opinion does not treat unitariness as a rigid concept; it instead insists that a school district seeking freedom from continued judicial oversight must prove that any current racial imbalance is not connected to the prior de jure system. *Dowell* does not mark a retreat from the principle that "[t]he measure of any desegregation plan is its effectiveness." *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971); *see also Freeman*, 112 S. Ct. at 1446. We previously applied this test in assessing the district court's unitariness[3] finding under the clearly erroneous standard. *Brown*, 892 F.2d at 868.

The Supreme Court's cases charge school boards that once operated school systems segregated by law "with the

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[3] The term "unitary" describes a school system or a facet of a school system that has been brought into compliance with the constitution. *See Board of Educ. v. Dowell*, 111 S. Ct. 630, 636 (1991).

affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968). After an initial finding of liability, the district court may enforce this duty "without any new proof of a constitutional violation." *Freeman*, 112 S. Ct. at 1456 (Blackmun, J. concurring). Here, the question is not whether plaintiffs successfully established in the 1986 trial that the school system operated in a manner inconsistent with the constitutional guarantee of equal protection; that question was answered in 1955. Instead, as we made clear in our initial opinion, the question is whether Topeka has successfully discharged the duty imposed by the Constitution to eliminate the vestiges of de jure segregation.

Both *Dowell* and *Freeman* address the means by which a school system may be discharged from the active supervision of the court. In *Dowell*, the Court required the district court to consider "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[4] *Dowell*, 111 S. Ct. at 638; *Freeman*, 112 S. Ct. 1449-50. *Dowell*

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[4] Any tension perceived by the school board between this standard and our requirement that the school system must "eliminate[] all traces of past intentional segregation to the maximum feasible extent," *Brown v. Board of Educ.*, 892 F.2d 851, 859 (10th Cir. 1989), is more imagined than real. Indeed, a leading dictionary defines "practicable" as "feasible." *See Webster's Third New International Dictionary* at 1780 (1981). The same dictionary defines "vestige" as "a remaining bit that constitutes a memorial or trace." *Id.* at 2547.

reaffirmed *Green*'s requirement that a court considering whether the vestiges of past segregation have been eliminated must look to "every facet of school operations." 111 S. Ct. at 638 (quoting *Green*, 391 U.S. at 435).

Freeman expanded on this requirement by explicitly stating that "[a] federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control," 112 S. Ct. at 1444-45, thereby allowing a school system to achieve compliance in one facet of its operations before it has fulfilled the whole of its affirmative duty. Neither *Dowell* nor *Freeman* suggests that the plaintiffs in the remedial phase of school desegregation litigation must make a new showing of discriminatory intent in order to obtain relief from a current condition of segregation. The district court here wrongly required the plaintiffs to make such a showing. *See Brown*, 671 F.Supp. at 1295 ("Plaintiffs have the burden of proving that illegal segregation exists in U.S.D. #501.").

"Proper resolution of any desegregation case turns on a careful assessment of its facts." *Freeman*, 112 S. Ct. at 1437. The facts underlying this case are far different than those before the Supreme Court in either *Dowell* or *Freeman*. In Oklahoma City, the school board adopted a comprehensive plan to desegregate the school system in 1972 and operated under that plan for many years. *See Dowell v. Board of Educ.*, 890 F.2d 1483, 1486-87 (10th Cir. 1989), *rev'd*, 111 S. Ct. 630 (1991). In DeKalb County, the district court had approved a plan to achieve maximum practicable desegregation. *Freeman*, 112 S. Ct. at 1447. Subsequent to the implementation of the plan, demographic changes resulted in largely segregated

residential neighborhoods. At the same time, the population of DeKalb County increased dramatically. *See id.* at 1438-40. In the face of these changes, the school system aggressively employed a Minority-to-Majority transfer program and several magnet school programs in an effort to maintain some level of racial balance in student assignment. *Id.* at 1440. In Topeka, in contrast, the school board did very little to desegregate its student assignment practices.[5] *See Brown*, 892 F.2d at 874. Fortunately, increasing residential *integration* actually helped to decrease racial segregation in some of the city's neighborhood schools. Unlike DeKalb County, the best that can be said of Topeka's efforts is this: "The district *has not bucked* the demographic forces that have improved the racial balance of schools." *Brown*, 671 F.Supp. at 1309 (emphasis added).[6]

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[5] The same is true with regard to faculty/staff assignment practices. "In Topeka, . . . there is a clear patters of assigning minority faculty/staff in a manner that reflects minority student assignment." *Brown*, 892 F.2d at 872. This pattern may itself reinforce racial identifiability, and if left unattended "will act as an incubator for resegregation in other []" facets of the school system. *Freeman v. Pitts*, 112 S. Ct. 1430, 1455 (1992) (Souter, J. concurring). Nothing in the recent Supreme Court cases alters our holding with regard to faculty/staff assignments. We reiterate that a failure to achieve compliance with regard to faculty/staff assignment is particularly disturbing because it is the one facet within the exclusive control of the local school authorities.

[6] The district court's decision in *Freeman* rested in part on its holding that the DeKalb County schools were successfully desegregated in student assignment in 1969. *Freeman*, 112 S. Ct. at 1439. Subsequent resegregation, the district court held, was caused by demographic changes unconnected to the prior de jure system. *Id.* at 1438-40. In the present case, the district court did state: "Demographic forces, uncontrolled by defendants, form the racial

"Our post-*Green* cases provide that, once state-enforced school segregation is shown to have existed in a jurisdiction in 1954, there arises a presumption, . . . that any current racial imbalance is the product of that violation." *Freeman*, 112 S. Ct. at 1453 (Scalia, J. concurring); *see United States v. Fordice*, 112 S. Ct. 2727, 2735 (1992). This is the presumption that the district court failed to accord plaintiffs in this case. *See Brown*, 892 F.2d at 867-68. At the time of trial, the Topeka school system operated a number of racially identifiable schools. *See id.* at 870. In the continuing remedial phase of this litigation, then, the district court must impose upon defendants the substantial burden of demonstrating the absence of a causal connection between any current condition of segregation and the prior de jure system. Until the school district meets this

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composition of the schools." *Brown v. Board of Educ.*, 671 F.Supp. 1290, 1310 (D.Kan. 1987). This comment, however, is in considerable tension with the district court's observations that demographics have had a desegregative influence on student assignment in Topeka's schools. *See Brown*, 892 F.2d at 874. Moreover, in light of the school district's failure to ever operate without racially identifiable schools, and the district court's failure to apply the appropriate legal standard, the court's conclusion that demographics caused segregation simply does not amount to a supportable holding that the current condition of segregation in Topeka is wholly unconnected to the prior de jure school system. The absence of a moment at which Topeka achieved compliance with the Constitution is vital because it is only "*[o]nce* the racial imbalance due to the *de jure* violation has been remedied [that] the school district is under no duty to remedy imbalance that is caused by demographic factors." *Freeman*, 112 S. Ct. at 1447 (emphasis added).

burden, the district court must retain some measure of supervision over the school system.[7]

In this case, the district court disregarded Topeka's history of inaction, observing: "At any time, more could have been done to achieve racial balance in the schools. But, it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." *Brown*, 671 F.Supp. at 1309. To expect the lingering effects of legally mandated separation to magically dissolve with as little effort as the Topeka school district exerted, *see Brown* 892 F.2d at 874, is to expect too much. "[S]tubborn facts of history linger and persist," *Freeman*, 112 S. Ct. at 1448, and, if left unattended, they fester. The Constitution does not permit the courts to ignore today's reality because it is temporally distant from the initial finding that the school system was operated in violation of the constitutional rights of its students. Temporal distance matters only to the extent that changes across that time period, unconnected to the de jure system's lingering effects, are responsible for what is observable today. *See Freeman*, 112 S. Ct. at 1448 ("fundamental changes . . . not attributable to the former *de jure* regime" responsible for currently segregated schools).

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[7] This supervision does not amount to the imposition of federal jurisdiction in perpetuity. "[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Dowell*, 111 S. Ct. at 637. We simply insist that the school board accomplish the required "*transition* to a system of public education freed of racial discrimination." *Id.* (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 299-301 (1955)), prior to the relinquishment of federal court jurisdiction.

The district court's conclusion that the Topeka system had achieved unitary status depended on its belief that the "district's conduct over thirty years [did not] indicate [] a desire to perpetuate segregation." 671 F.Supp. at 1309; *see id.* at 1311 ("The racially imbalanced schools are not the product of overt or covert intentional segregative conduct."). This belief does not adequately support the court's decision. The absence of affirmatively discriminatory action or intent across time is insufficient, without more, to demonstrate the lack of a causal connection between the prior de jure system and the present system. It is far easier to demonstrate an absence of segregative intent than it is to rebut the presumed causal connection between current conditions and legally mandated segregation.[8] *See Freeman*, 112 S. Ct. at 1453 (Scalia, J. concurring) (presumed connection is powerful).

The lesson of *Freeman* is not that demographic changes in a district absolve a school board of its affirmative duty to desegregate. Instead, the case teaches that demographic change may produce racially identifiable schools in a district that has fulfilled its affirmative duty. What matters is whether current racial identifiability is a vestige of a school system's de jure past, or only a product of demographic changes outside the school district's control. If the current condition is a vestige then the school system has not fulfilled its affirmative duty. "If the State has not discharged this duty, it remains in violation of the Fourteenth Amendment." *Fordice*, 112 S. Ct. at 2735.

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[8] Indeed, several of the school district's actions across time had directly segregative effects. *See Brown*, 892 F.2d at 874-77.

We have little reason to doubt defendant's repeated insistence that its various decisions were not motivated by racial animus. Indeed, the innovative character of the school system by the time of trial suggests a genuine commitment to providing quality education to all its students. *See Brown*, 892 F.2d at 889. The district court thought such a showing sufficient. As a matter of law, it was not. *See Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) ("As was clearly established in [prior cases], the Board had to do more than abandon its prior discriminatory purpose."); *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1095 (11th Cir., 1992) ("[S]chool officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system."). The school system failed to demonstrate that the current racial identifiability of its schools is not connected to its prior practice of segregation. *See Brown*, 892 F.2d at 877. Nothing in *Freeman* or *Dowell* compels us to alter that conclusion.

II.

In shaping a remedy on remand the district court should, in accordance with *Freeman*'s incremental approach, consider whether it would be appropriate to relinquish supervision of those areas of the school system plaintiffs conceded were unitary. *See Brown*, 892 F.2d at 869 n.53 ("Topeka school system is unitary with respect to facilities, extracurricular activities, curriculum, transportation, and equality of education."). In so doing, the district court must assess

> whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and *whether the school district has demonstrated*, to the public and to the parents and students of the once disfavored race, *its good faith commitment to the whole of the court's decree* and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Freeman, 112 S. Ct. at 1446 (emphasis added). *Freeman* thus requires the district court to make two findings before withdrawing its supervision incrementally. First, the court must find that the relinquishment of control over the facet at issue would not make it impossible to craft a remedy that will achieve compliance in the system's other facets. Next, the court must find that the school system has demonstrated good faith. This second inquiry is not limited to an individual facet. Instead, the court must consider the system's efforts to desegregate, as a whole, across time. *Id.*

In its initial opinion, the district court did not evaluate the school system's good faith. On remand, it must make such a finding and its evaluation must be based on objective criteria. *See id.* Mere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith. *Id.*

In its brief, after the Supreme Court remanded this case to us, the school district argued that:

> If Plaintiffs prevail in this case and a court-ordered remedy is implemented, the danger is that in Topeka, as in Oklahoma City and DeKalb County, the remedy will not have more than a temporary effect upon student attendance figures. Depending upon the nature of the remedy, white flight from the racially balanced schools may occur, as well as community resentment over court interference and the expenditure of resources for noncurricular purposes. Under the teaching of *Dowell*, after the Topeka school district would have complied with such a plan in good faith for a number of years, court jurisdiction could then be withdrawn. It is highly probable that the neighborhood schools at the time of withdrawal would be more imbalanced than they are today. *Why should Topeka schools be burdened for no long-term benefit?*

Brief of Appellee at 36 (citation omitted) (emphasis added). It is difficult to understand how the district can contend that compliance with the Constitution does not confer a long-term benefit upon the students in Topeka. At the same time, the district's argument highlights a potential problem with *Dowell*. Depending on the definition of "good faith," the possibility of immediate resegregation following a

declaration of unitariness seems all too real. For this reason, we are convinced that evaluation of the "good faith" prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be said to be acting in "good faith." *See Dowell*, 111 S. Ct. at 637 (prior to discharge, district court must find "that it was unlikely that the school board would return to its former ways.").

In order to show good faith, for purposes of either incremental or final discharge from ongoing court supervision, Topeka must demonstrate that "its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations." *Freeman*, 112 S. Ct. at 1446. The inquiry into Topeka's good faith, like the inquiry into whether further remedial efforts are necessary, must consider whether Topeka has taken such affirmative steps in the direction of desegregation so as to establish a "consistent pattern of lawful conduct." A comprehensive plan, adopted and followed by the school board, aimed at eliminating the vestiges of segregation to the system would be evidence of good faith; so might a school board resolution declaring the school board's intention to comply with the Constitution in the future, *see Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426, 1428 (11th Cir. 1992), but only if coupled with affirmative efforts across time. As we have observed above, inaction in the face of the affirmative duty to desegregate is not lawful conduct. A school system that does not take the required steps cannot be found in good

faith and may not be discharged from continued supervision with respect to any facet of its operations.

The decision of a court to relinquish supervisory control over one or more facets of the school system is not tantamount to an abandonment of jurisdiction. Therefore, if it were later to appear that a vestige of segregation in a facet still under the court's control has led to a reemergence of segregation in a facet over which the court had relinquished control, the court would not be powerless to react. "[B]ecause the court retains jurisdiction over the case, it should of course reassert control over [the relinquished area] if it finds that this does happen." *Freeman*, 112 S. Ct. at 1455 (Souter, J. concurring). In such an event, because the reemergence would be linked to a vestige of the past system, it would itself be a vestige. Consequently, no showing of discriminatory intent would be needed to enable the court to address the problem.

With respect to the areas of student assignment and faculty/staff assignment, which were not unitary when the trial was held in this case, the district court must consider the current situation in Topeka schools in order to fashion an appropriate remedy. Six years have passed since the trial, and it is likely that many changes have occurred in the school system. The district court should inquire into the recent history of Topeka's efforts to fulfill its affirmative duty, and should assess the effects of those efforts on student and faculty staff assignments. It must shape a remedy that addresses the remaining vestiges of segregation in the Topeka school system, and that promises to eliminate them to the extent practicable. *See Dowell*, 111 S. Ct. at 638.

III.

We are mindful of the limited authority and ability of the courts to reshape society, but we possess an abiding respect for the constitutional guarantee of equal protection and the responsibility of the courts to insure that government fulfills its promise to all its citizens. The law that required reversal of this case in 1990 has not been changed by *Freeman* or *Dowell*. The opinion we reinstate today is consistent with these most recent Supreme Court pronouncements in the area of school desegregation. We say simply that because Topeka has not fulfilled its affirmative duty in the areas of student and faculty/staff assignments, the district court erred in concluding that the system as a whole had achieved unitary status. The district court must instead formulate an appropriate remedy.

Accordingly, we again REVERSE the decision of the district court, and we REINSTATE our prior opinion.

APPENDIX F

No. 87-1668, Oliver Brown, et al. and Charles Smith and Kimberly Smith, Minor Children, By Their Mother and Next Friend, Linda Brown Smith, et al., v. Board of Education of Topeka, Shawnee County, Kansas, et al.

BALDOCK, Circuit Judge, dissenting.

Nothing so needs reforming as other people's habits.

--Pudd'nhead Wilson's Calendar

Mark Twain, *Pudd'nhead Wilson* ch. XV.

The Supreme Court vacated this court's judgment in *Brown v. Board of Educ.*, 892 F.2d 851 (10th Cir. 1989), and remanded for reconsideration in light of its two most recent pronouncements in the field of public school desegregation, *Board of Educ. v. Dowell*, 111 S. Ct. 630 (1991) and *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). *See Brown v. Board of Educ.*, 112 S. Ct. 1657 (1992). The vacation of the judgment and remand were apt because both Supreme Court cases address "the duties of a district court during the final phases of a desegregation case . . . ." *See Freeman*, 112 S. Ct. at 1446.

Parsing those decisions for the minimal support they provide its prior resolution, this court again reverses the district court's judgment and reinstates its prior opinion "in full." Court's Opinion at 2. This court again finds the Topeka system not unitary and requires another

desegregation plan, at least in the areas of student and faculty/staff assignment, notwithstanding that the Supreme Court has announced important new principles concerning the later phases of school desegregation.

Dowell and *Freeman* reaffirmed that federal court involvement in school desegregation was always meant to be temporary, confined to remedying a constitutional violation and restoring control to state and local authorities. *Freeman*, 112 S. Ct. at 1445; *Dowell*, 111 S. Ct. at 636; *Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426, 1430 (11th Cir. 1992). Thus, a federal court may withdraw from supervision of a school district in increments as the district achieves unitary status over each facet of its operations. *Freeman*, 112 S. Ct. at 1445. Once a school district has achieved unitary status, actions concerning student assignment, even if they result in racial imbalance, must be evaluated under traditional equal protection principles which require a showing of intentional discrimination. *Dowell*, 111 S. Ct. at 638; *United States v. Overton*, 834 F.2d 1171, 1175-76 (5th Cir. 1987). *See also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-23 (1971) (discussing the use of school desegregation cases for purposes beyond their scope). To read this court's latest opinion, one would be hard pressed to divine that the school officials *prevailed* in both *Dowell* and *Freeman*, and the Supreme Court *reversed* the lower appellate courts as going too far.

This court remains convinced that the district court incorrectly (1) required the plaintiffs to prove discriminatory intent, (2) did not accord the plaintiffs the presumption that racially imbalanced schools are attributable to the de jure

system, and (3) did not insist on a sufficient showing by the defendant school district to prove compliance with its affirmative duty. Court's Opinion at 6, 8 & 9-11. For several reasons explained previously, I disagree that the district court incorrectly applied the presumption and burden shifting principles involved in a school desegregation case.[1] *See Brown*, 892 F.2d at 889 (Baldock, J., dissenting). The district court recognized that Topeka had an affirmative duty to eliminate the vestiges of segregation and apparently concluded that the school board had overcome the presumption against it inherent in racially imbalanced schools. *See Brown v. Board of Educ.*, 671 F. Supp. 1290, 1292-93, 1295 (D. Kan. 1987). *See also Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992). As conceded at oral argument, however, the district court's short discussion of the burden of proof is not free from ambiguity. *See Brown*, 671 F. Supp. at 1295.

This case should be remanded to the district court for complete reconsideration. We could then be assured of the district court's application of the correct presumption and

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[1] The district court's observation that the passage of time and demographic changes "detract from the justification," *Brown v. Board of Educ.*, 671 F. Supp. 1290, 1295 (D. Kan 1987), for the presumption that racial imbalance is attributable to the school board is similar to Justice Scalia's observation in *Freeman*: "At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools." 112 S. Ct. at 1453 (Scalia, J., concurring). Be that as it may, the district court indicated that, regardless of the presumption, the "*defendants* have proven by a preponderance of the evidence that U.S.D. # 501 is a unitary school system." *Brown*, 671 F. Supp. at 1295 (emphasis added).

burden shifting principles and have the advantage of the district court making the myriad of required factual findings. More importantly, the district court can incorporate into its analysis the Supreme Court's recent guidance concerning the role of good faith and demographic change in the later phases of school desegregation.

Given the sharply differing views of the experts in this case, this court should reconsider its insistence on trying the case on appeal. In both *Dowell* and *Freeman*, the Supreme Court acknowledged the importance of a district court's evaluation of the evidence, including expert testimony,[2] in deciding whether a school district has complied with the Constitution. *See Dowell*, 111 S. Ct. at 638 (remanding to the district court to decide "whether the Board made a sufficient showing of constitutional compliance"); *Freeman*, 112 S. Ct. at 1440 (concerning whether DCSS had met its affirmative duty, "[p]etitioners and respondents presented conflicting expert testimony about the potential effects that desegregative techniques not deployed might have had upon the racial mix of the schools. The District Court found that the petitioner's experts were more reliable. . . ."); *id.* at 1439 (in deciding that DeKalb

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[2] In its prior opinion holding the district court's unitariness finding "clearly erroneous," this court claimed that it did not rely on expert opinion, but rather uncontroverted evidence concerning the racial composition of the various schools and what the school district did or did not do to meet its affirmative duty. *Brown*, 892 F.2d at 868 n.50. *See also id.* at 911-913 (Baldock, J. dissenting). The Supreme Court is fully aware of the importance of expert testimony in school desegregation cases. This case is no different. The conflicting expert testimony in this case should be considered by the trier of fact.

County School System ["DCSS"] was unitary as to student assignment in 1969 despite the presence of two majority-minority schools, district court relied on "expert witness testimony that Terry Mill [school] had become a majority black school as a result of demographic shifts unrelated to the actions of petitioners or their predecessors"). The record in this case is filled with conflicting evidence concerning the unitary status inquiry demanded by *Dowell*: "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." 111 S. Ct. at 638 (footnote omitted). *See also Etowah County*, 963 F.2d at 1424 n.9 (*Dowell* provides standard for unitariness inquiry).

This court's decision that Topeka did not comply with its affirmative duty and did not prove that racial imbalance was not attributable to de jure segregation is tantamount to directing a verdict in favor of the plaintiffs. But this is not a case where the evidence "is so one-sided that one party must prevail as a matter of law." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (discussing directed verdict standard); *Etowah County*, 963 F.2d at 1425 (district court improperly granted summary judgment given "a genuine issue of material fact as to the defendant's attainment of unitary status"). The massive record in this case contains evidence concerning student and faculty/staff assignment[3] which could support either side. *See Brown*,

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[3] The data on faculty/staff assignment is particularly well-suited for district court findings. *See Brown*, 892 F.2d at 927-935 (discussing problems with this court's factual findings).

892 F.2d at 890, 911-13 (Baldock, J., dissenting). We should rely "on the informed judgment of the district [] court in the first instance." *See Swann*, 402 U.S. at 28.

Although this court recognizes, as it must given the clear language of *Dowell* and the concession of the plaintiffs at oral argument, that the district court must consider "whether the Board had complied in good faith with the desegregation decree since it was entered," 111 S. Ct. at 638, this court then limits the good faith inquiry to events subsequent to 1986 by apparently deciding as a matter of law that Topeka cannot demonstrate good faith before 1986.[4] *See* Court's Opinion at 14. In evaluating good faith

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[4] Identifying a "potential problem with *Dowell*," this court determines that to demonstrate "good faith," before incremental withdrawal of federal control will be allowed, a school system must demonstrate its "continued commitment to integration." Court's Opinion at 13. This requirement could make the withdrawal of federal court supervision more apparent than real if it requires the promise of affirmative conduct on the part of the school board once a district becomes unitary. Good faith compliance with a desegregation decree "over a reasonable period of time" is relevant because it is "evidence that any current racial imbalance is not the product of a new *de jure* violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer *intentional* discrimination in the future." *Freeman*, 112 S. Ct. at 1449-50 (emphasis added and citation omitted). Although this court is anxious to deal with "the possibility of immediate resegregation following a declaration of unitariness," Court's Opinion at 13, that question is not before us. this court's forward cast to the definition of good faith appears to be from the same bolt of cloth as *Dowell v. Board of Educ.*, 890 F.2d 1483, 1490 (10th Cir. 1989) ("For this reason, the court's jurisdiction extends beyond the termination of the wrongdoing . . . because an injunction seeks to stabilize a factual setting with a judicial ordering and *maintain* that condition which the order sought to create.") (citation omitted), *rev'd*, 111 S. Ct. 630 (1991).

compliance, the district court may consider that "with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish . . . ." *Freeman*, 112 S. Ct. at 1446. Deciding these highly factual points as a matter of law is perfectly consistent with this court's prior appellate factfinding and strong reluctance to return this case to the district court to revisit events prior to 1986.

This court's remand of the case for formulation of another desegregation plan may be a costly and unnecessary exercise in social engineering given the demographic characteristics which the district court determined were now responsible for student assignment patterns.[5] The Supreme Court recognized that the mobility of American society and the private residential choices of Americans frequently contribute to racial imbalance. *Freeman*, 112 S. Ct. at 1448. *See also Flax v. Potts*, 915 F.2d 155, 161-62 (5th Cir. 1990). The Court held that a school district is not required to racially balance student assignments "in the late phases of carrying out a decree, when the imbalance is attributable neither to the prior *de jure* system nor to a later violation by the school district but rather to independent demographic forces." *Freeman*, 112 S. Ct. at 1447.

In reaching this holding, the Supreme Court apparently relied on the following facts:

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[5] The district court found that de jure system was not responsible for residential choice which resulted in racially imbalanced schools. *Brown*, 671 F. Supp. 1290. *See also Freeman*, 112 S. Ct. at 1454 (Souter, J. Concurring) (school segregation may cause residential segregation).

> In the case before us the District Court designed a comprehensive plan for desegregation of DCSS in 1969, one that included racial balance in student assignments. The desegregation decree was designed to achieve maximum practicable desegregation. Its central remedy was the closing of black schools and the reassignment of pupils to neighborhood schools, with attendance zones that achieved racial balance. The plan accomplished its objective in the first year of operation, before dramatic demographic changes altered residential patterns. For the entire 17-year period the respondents raised no substantial objection to the basic student assignment system . . . .

Id. Although the Court indicated that the plan achieved racial balance, the plaintiffs introduced evidence that 5.6% of the student population was black in 1969, yet two elementary schools had majority-minority student assignment (76% and 51% black). *Id.* at 1439. As noted, the district court "found the racial imbalance in these schools was not a vestige of the prior *de jure* system." *Id.*

Here, the district court concluded that demographic forces are responsible for the racial composition in Topeka's schools. *Brown*, 671 F. Supp. at 1310. This court claims that such a conclusion "is in considerable tension with the district court's observations that demographics have had a desegregative influence on student assignment in Topeka's schools." Court's Opinion at 7 n.6 (citing *Brown*, 892 F.2d

at 874). The district court, however, appears to have made that observation primarily in the context of increased minority enrollment in schools which have had high concentrations of white enrollment. *See Brown*, 671 F. Supp. at 1300. The district court did attribute higher than average minority enrollment in many schools to demographic factors, unrelated to school board action. *See id.* at 1301-03. This court also discounts the demographic element given "the school district's failure to ever operate without racially identifiable schools, and the district court's failure to apply the appropriate legal standard . . . ." Court's Opinion at 7 n.6. This statement rests on this court's overinclusive definition of racial identifiability, *see Brown*, 892 F.2d at 911-912 (Baldock, J., dissenting); *Lee v. Macon County Board of Educ.*, 970 F.2d 767, 774 n.23 (11th Cir. 1992) (noting that a school which is 64% black is not racially identifiable; a school which is 94% black is), and liability in the absence of racial balance, regardless of the showing made by the school district which has the substantial, but not insurmountable, "burden of showing that any current imbalance is not traceable, *in a proximate way*, to the prior violation."[6] *See Freeman*, 112 S. Ct. at 1447

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[6] The similarity between Justice Blackmun's opinion concurring in the judgment in *Freeman*, 112 S. Ct. at 1457-60, and this court's opinion in *Brown*, 892 F.2d 851, is all too obvious. Justice Blackmun thought it imperative that the district court reexamine its conclusion that DCSS had met its affirmative duty and was unitary with respect to student assignment. *Freeman*, 112 S. Ct. at 1460. He was of the view that, analyzed under the correct legal principles, DCSS could not prove that its past segregative acts were not responsible for current (and pronounced) racial imbalance. A majority of the Court, however, did not join in the approach. We should not

(emphasis added). I would require the district court to reconsider the demographic variable on remand. Use of current data is essential.[7]

This court attempts to distinguish *Dowell* and *Freeman* from *Brown* on the basis that school authorities in Oklahoma City and DeKalb County conducted aggressive desegregation efforts, but that Topeka did "very little" and the best that can be said is that Topeka did not resist demographic changes which improved racial balance. First, Topeka has successfully implemented two desegregation plans. *See Brown*, 892 F.2d at 895-98, 904-08 (Baldock, J. dissenting). Second, Topeka has no one-race minority or virtually one-race minority schools; only three schools were majority-minority in 1985-86; Belvoir (61.86% minority),

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follow it here.

[7] As Judge Selya recently observed in another context:

> One implication of the recent Supreme Court school desegregation decisions is that federal courts, at least in the minerun of civil rights and institutional reform cases, have no choice but to make decisions about the maintenance, modification, or dissolution of structural remedial orders by referring to the most current population statistics readily available. After all, knowledge of demographic shifts is essential for determining whether patterns of minority representation in state institutions and organizations reflect state action, which has constitutional implications, or private preferences, which, generally, do not. *See, e.g., Freeman v. Pitts*, __ U.S. __, 112 S. Ct. 1430, 1437-38, 1447-48, 118 L. Ed. 2d 108 (1992)

Mackin v. City of Boston, 969 F.2d 1273, 1276-77 (1st Cir. 1992).

Highland Park North (57.93%) and Lafayette (56.81%).[8] *See id.* at 936-37 n.43, 939 n.45, 939-40 n.46.

There are remarkable similarities between *Freeman* and the facts of this case, but Topeka has far less racial imbalance than DCSS[9] and probably has done at least as much as DCSS (and over a longer period of time) to encourage racial balance. Of obvious concern to the plaintiffs in *Freeman* were the following facts: (1) in a system in which forty-seven percent of the students were black, fifty percent of the black students attended schools which were 90+% black, (2) five out of twenty-two high schools were 90%+ black, and (3) eighteen of seventy-four elementary schools were 90%+ black. Topeka has no 90%+ black schools, although it does have three elementary schools which have a slight majority of minority students. Approximately twenty-five percent of the black elementary students attend these three schools.

Notwithstanding the understandable concerns of the *Freeman* plaintiffs concerning racial balance, the Supreme Court necessarily determined that DCSS had satisfied its

---

[8] Belvoir and Highland Park North were annexed to the Topeka district in 1959 with substantial majorities of white students; Lafayette was an all white de jure school in 1954. *See Brown*, 892 F.2d at 936, 938-39 (Baldock, J., dissenting). The district court in *Freeman* relied on similar facts in concluding that two majority black schools were not vestige schools in 1969. 112 S. Ct. at 1439.

[9] Topeka also has far less racial imbalance than that created in Oklahoma City under a 1984 student reassignment plan. The plan resulted in eleven out of sixty-four school becoming 90%+ black as to student assignment. *Dowell*, 111 S. Ct. at 634.

affirmative duty to desegregate as to student assignment after the first year of a 1969 plan which closed black schools and reassigned students to *neighborhood* schools, with attendance zones that achieved racial balance.[10] 112

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[10] The court of appeals had flatly rejected the district court's decision that DCSS had no further responsibility concerning student assignment:

> The plaintiffs argued that DCSS never achieved a constitutionally-sufficient level of desegregation. The plaintiffs argue that until the DCSS achieves unitary status, it must affirmatively move toward the maximum practical level of desegregation. The plaintiffs also argue that demographic shifts do not excuse the DCSS's resegregation.
>
> The DCSS argues that it fulfilled its duties in the area of student assignment when it closed all de jure black schools following the district court's 1969 order. The DCSS argues that the district court properly refused to find it responsible for segregation caused by demographic changes.
>
> We hold that a school system that has not achieved unitary status must take affirmative steps to gain and maintain a desegregated student population. The DCSS may not shirk its constitutional duties by pointing to demographic shifts occurring prior to unitary status. Accordingly, we reverse the district court's conclusion that DCSS fulfilled its constitutional obligations in the area of student assignment.
>
> . . . .
>
> Student segfegation, prior to achieving unitary status, indicates that vestiges remain. Therefore, the DCSS must continue to work toward desegregation until it removes all vestiges. The fact that the DCSS achieved racial parity in the area of student assignment on the da it closed the de jure

S. Ct. at 1447. Topeka also employed a neighborhood plan. In *Freeman*, the district court determined that two majority-minority schools in 1969 were not vestige schools. 112 S. Ct. at 1439. Here, the district court determined that the three majority-minority schools were not vestige schools. *Brown*, 671 F. Supp. at 1301-03. In *Freeman*, the plaintiffs did not raise their complaint about the student assignment system for seventeen years after enactment of the plan, 112 S. Ct. at 1447; *Brown* was dormant for twenty-four years, 671 F. Supp. at 1291-92.

Even at this late stage in the desegregation litigation (thirty-seven years after *Brown I*, 347 U.S. 483 (1954)), the school board is obligated to remedy racial imbalance, but only if it is a vestige of the de jure system. *Freeman*, 112 S. Ct. at 1447. We cannot lose sight that "[t]he mix that would have occurred but for the racism is a judicially created hypothetical." *Overton*, 834 F.2d at 1176. After thirty-seven years, the school district must be allowed to focus on the promise of a public school education to develop the potential in every child, notwithstanding declining enrollments, limited governmental resources and social problems. Our Constitution does not elevate punitive over practical considerations. *See Harris v. Crenshaw County*

> black schools does not demonstrate that it fulfilled its duties to achieve maximum possible desegregation and to avoid the reestablishment of a dual system.

Pitts v. Freeman, 887 F.2d 1438, 1448-49 (11th Cir. 1989) (footnote omitted), *rev'd*, 112 S. Ct. 1430 (1992).

Bd. of Educ., 968 F.2d 1090, 1096-97 (11th Cir. 1992); *Overton*, 834 F.2d at 1177.

Once a school district has demonstrated that it has operated free of the taint of intentional segregation, control must devolve to local authorities. Withholding unitary status until perfect racial balancing occurs cannot guarantee tolerance, remedy ignorance or obliterate prejudice. Rather, it serves to distance the patrons of the school district from school officials by permanently displacing state and local authority guaranteed by the Constitution. It also minimizes the arduous gains in racial equality and reneges on the promise of eventual autonomy made to a school district which has operated in good faith. Imposing a remedy on Topeka in the manner adopted by this court, when the district court legitimately could find otherwise were it allowed to exercise its traditional factfinding power, betrays "the sense of basic fairness inherent in equity," especially important in this sensitive area. *See Swann*, 402 U.S. at 31. Because I believe that the case should be remanded for reconsideration of all issues by the district court in light of the directly relevant and new authority commended to us by the Supreme Court, I respectfully dissent.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al., Plaintiff, and CHARLES SMITH; KIMBERLY SMITH, minor children, by their mother and next friend; LINDA BROWN SMITH; DANIELLE THREATT, a minor child, by her mother and next friend; JUDA GAINES; SHAWN WOODS; TANYA WOODS; TARA WOODS, minor children, by their mother and next friend; JOYCE WOODS; CORDELLIA MITCHELL; CONNIE MAXWELL, minor children, by their mother and next friend; BARBARA MITCHELL; ARLENE JACKSON, a minor child, by her mother and next friend; CHARLENE BURKES; CARLESIA ROBINSON; CHERYL ROBINSON, minor children, by their mother and next friend; PATRICIA ROBINSON; RUFUS D. KELLEY; MICHELLE KELLEY, minor children, by their father and next friend; RUFUS KELLEY; JOHN DAVIS; JACKIE DAVIS; JOHNNY DAVIS; VIOLA DAVIS, minor children, by their mother and next friend; RUBY DAVIS, Plaintiff-Intervenors-Appellants.	) No. 87-1668)(D.C. No. T-316)

v.)
)
BOARD OF EDUCATION OF TOPEKA,)
SHAWNEE COUNTY, KANSAS;)
DOROTHY GROESBECK; KAY)
GRONEMAN; RUTHANN OELSNER;)
DALE CAREY; ANN KEENER;)
MARILYN HARWOOD; THEODORE)
VON FANGE; JIM HIEBERT; DENISE)
APT.; EVELYN WHITCOMB, MEMBERS)
OF THE STATE OF KANSAS BOARD OF)
EDUCATION, all of their official)
capacities; X UNIFIED SCHOOL)
DISTRICT #501, Shawnee County, Kansas;)
JOHN C. CARLIN,)
Defendants - Appellees.)
)
)
UNITED STATES OF AMERICA,)
)
Amicus Curiae.)

JUDGMENT
Entered October 27, 1992

Before McKAY, SEYMOUR, and BALDOCK, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, we again reverse the decision of the district court, and we reinstate our prior opinion. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER, Clerk

By_____
Patrick Fisher
Chief Deputy Clerk

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OLIVER BROWN, et al., Plaintiff, and CHARLES SMITH; KIMBERLY SMITH, minor children, by their mother and next friend; LINDA BROWN SMITH; DANIELLE THREATT, a minor child, by her mother and next friend; JUDA GAINES; SHAWN WOODS; TANYA WOODS; TARA WOODS, minor children, by their mother and next friend; JOYCE WOODS; CORDELLIA MITCHELL; CONNIE MAXWELL, minor children, by their mother and next friend; BARBARA MITCHELL; ARLENE JACKSON, a minor child, by her mother and next friend; CHARLENE BURKES; CARLESIA ROBINSON; CHERYL ROBINSON, minor children, by their mother and next friend; PATRICIA ROBINSON; RUFUS D. KELLEY; MICHELLE KELLEY, minor children, by their father and next friend; RUFUS KELLEY; JOHN DAVIS; JACKIE DAVIS; JOHNNY DAVIS; VIOLA DAVIS, minor children, by their mother and next friend; RUBY DAVIS, Plaintiff-Intervenors-Appellants,	) No. 87-1668)(D.C. No. T-316)

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS; DOROTHY GROESBECK; KAY GRONEMAN; RUTHANN OELSNER; DALE CAREY; ANN KEENER; MARILYN HARWOOD; THEODORE VON FANGE; JIM HIEBERT; DENISE APT.; EVELYN WHITCOMB, MEMBERS OF THE STATE OF KANSAS BOARD OF EDUCATION, all of their official capacities; X UNIFIED SCHOOL DISTRICT #501, Shawnee County, Kansas; JOHN C. CARLIN,

Defendants - Appellees.

UNITED STATES OF AMERICA,

Amicus Curiae.

ORDER

Entered January 28, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL AND KELLY, Circuit Judges.

Upon consideration of appellees' petition for rehearing and suggestion for rehearing in banc, appellants' response, and appellees' reply, the court orders as follows:

Appellees' petition for rehearing is denied by the panel that rendered the court's decision. Circuit Judge Baldock voted to grant rehearing.

The clerk transmitted the suggestion for rehearing in banc to members of the panel and all other judges of the court who are in regular active service, a vote was taken and, as a result of that vote, the suggestion for rehearing in banc is denied. Circuit Judges Anderson, Tacha, Baldock, Ebel and Kelly voted to grant rehearing in banc.

Entered for the Court

ROBERT L. HOECKER, Clerk

_____

Patrick Fisher
Chief Deputy Clerk

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Publ. L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252.

No. 92-1568

Supreme Court, U.S.
FILED
JUN 7 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNIFIED SCHOOL DISTRICT NO. 501,
SHAWNEE COUNTY, KANSAS

Petitioner,

vs.

CHARLES SMITH & KIMBERLY SMITH,
MINOR CHILDREN, BY THEIR
MOTHER AND NEXT FRIEND,
LINDA BROWN SMITH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

K. GARY SEBELIUS*
ANNE L. BAKER
WRIGHT, HENSON, SOMERS,
SEBELIUS, CLARK & BAKER
100 S.E. 9TH STREET, 2ND FLOOR
P.O. BOX 3555
TOPEKA, KANSAS 66601-3555
(913) 232-2200

*Counsel of Record

June, 1993

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TABLE OF CONTENTS

I. The Decisions of the District Court and the Court of Appeals 1

II. Reasons for Granting the Writ 7

III. Conclusion 10

TABLE OF AUTHORITIES

Freeman v. Pitts, 403 U.S. ___, 112 S.Ct. 1430 (1992) 6, 7, 9, 10

Board of Educ. v. Dowell, 498 U.S. 237, 111 S.Ct. 630 (1991) 10

I. THE DECISIONS OF THE DISTRICT COURT AND THE COURT OF APPEALS

A. The respondents, like the Tenth Circuit, attempt to obscure the district court's thorough consideration of the long history of desegregation in Topeka by relying upon distortions of a few isolated statements of the trial court and then contending that the Court of Appeals' decision is based upon an affirmance of these facts.[1] A proper review shows that the Court of Appeals reversed, rather than affirmed, the trial court with respect to nine facts enumerated by respondents on pages two and three and pages five and six of their response. Although respondents did not contend the trial court's findings of fact were clearly erroneous, the Court of Appeals did base its reversal upon *de novo* review of the record.

1. As to school boundaries, the district court held that "[a] review of the school boundaries as they have developed over thirty years does not reveal a segregative pattern that remains today." App. 29a. As to boundaries drawn around the former *de jure* black elementary schools in the mid 1950's, the district court held that the "schools have long been closed and the segregative effects of those boundaries have attenuated entirely." *Id.* The Court of Appeals reversed. App. 75b-77b.

2. The district court found that the minority percentage of students at Lowman Hill has been within

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[1] Eight factual findings which the majority identified as being made by the trial court are examined by the dissent (App. 73c-81c), which concludes, "Regrettably this court does not give a fair recitation of the district court findings". App. 73c. The same could be said of the respondents.

fifteen percent (15%) of the district average within recent years, and therefore the school is not racially identifiable. App. 30a. The Court of Appeals nevertheless found Lowman Hill to be "the most serious example of segregative attendance boundaries." App. 76b. The district court rejected plaintiffs' contention that Quinton Heights was a "black school" bordering on a "white school". App. 52a. The so-called "white school" (Stout Elementary) possesses a minority enrollment "very close to the district average." *Id.* The Court of Appeals found Quinton Heights' boundaries to be the "result of continued manipulation by the school district" (App. 85b), thereby reversing the district court's finding that "attendance zones are not segregatively gerrymandered." App. 32a.[2]

3. All *de jure* black schools had been closed by 1978, with three of the four having been closed by 1962. App. 9a, 25a. The dissent thoroughly examines the errors of the respondents' analysis of attendance statistics for Highland Park North Elementary (App. 143c-145c), Lafayette (App. 145c-150c), and Quinton Heights. App. 151c-161c. The district court found that "[t]he school closings over thirty years in the district indicate a policy of desegregation." App. 25a. The Court of Appeals reversed. App. 80b-81b.

4. As to school openings, the district court concluded, "In sum, it does not appear that the district's school construction policy has promoted segregated residential patterns or segregated schools."

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[2] The dissent fully examines the majority's errors regarding Quinton Heights (App. 151c-161c) and Lowman Hill. App. 161c-167c.

App. 28a.[3] The Court of Appeals reversed. App. 79b.

5. All optional attendance zones were eliminated in 1976. App. 23a. The district court found that "any segregative effect of the zones was slight and *does not remain today*." *Id.* (emphasis added). The Court of Appeals reversed. App. 61b.

6. According to respondents' own expert, space additions were used at predominantly white, predominantly non-white, and racially balanced schools. App. 24a. The district court found that there was no showing that space additions caused current racial imbalances. App. 24a-25a. The Court of Appeals reversed. App. 61b.

7. With respect to alternative decisions, the district court found that the 1984 plans, which would have eliminated all majority minority schools, were not adopted because of uniform and vigorous negative public reaction. App. 52a-53a. Further, it stated that although "[a]t any time, more could have been done to achieve racial balance,...it begs the issue of this case to argue that racial balancing must be done today because it was not done yesterday." App. 54a. Even the Court of Appeals refused to adopt respondents' position that the failure to adopt the reorganization plans evidence absence of commitment to desegregation. App. 67b n.75.

8. The district court rejected the allegation of a correlation between faculty and staff assignment and high minority student populations (App. 40a-43a), finding that the "district's approach to faculty and staff is not indicative of a dual system of education." App.

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[3] See dissent at App. 171c-175c.

43a. The Court of Appeals reversed, finding such correlation "clear". App. 54b.

9. As to student assignment in the Topeka schools at the time of trial, the district court concluded that the school district has "proven by a preponderance of the evidence that [it] is a unitary school system". App. 14a. "Although racial balance has not been achieved, students are not separated by race. Thus, a vestige of segregation has been eliminated." App. 20a. The Court of Appeals reversed, holding that statistics regarding the percentage of minorities "speak for themselves" and "add up to a current condition of segregation" in the Topeka school system. App. 49b. As to faculty and staff assignments, the district court found that "all of the schools have been within the $\pm$10% range in the last ten (10) years" (App. 43a) and that such assignments do not "serve to identify schools as intended for white or black students." *Id.* The Court of Appeals reversed, substituting its evaluation of the data for that of the trial court. App. 50b, 54b, 72b-74b.

The Court of Appeals did not "largely [affirm] the primary factual findings of the district court." Res. Brief at 5. The reversed factual findings, discussed above, regarding current segregation as to students and faculty and staff assignments were the essential findings which shifted to the defendant district the burden of proof to show that imbalances were not causally related to the prior *de jure* system. In addition, the Court of Appeals rejected the district court's view of the evidence in favor of that of the respondents' experts (See App. 1c-2c), ignored the highly relevant changes in the district made by full implementation of the HEW approved desegregation plans (App. 63b-64b), rejected

as irrelevant the segregation caused by demographic forces beyond the control of the district (App. 65b-66b, 81b), and required a showing that maximum practicable desegregation had been achieved as the only relevant evidence to show an absence of causal connection between current imbalances and the prior *de jure* system. App. 30b.

B. Respondents identify two supposedly erroneous legal rulings of the trial court which allegedly explain the divergent results of the trial and appellate courts. The respondents claim that the district court imposed upon plaintiff the burden of "showing that actions taken by the school board between 1951 and the time of trial were intentionally segregative." Res. Brief 3. The respondents mischaracterize the district court's analysis. Intent was considered relevant to the unitariness issue, but not controlling. "The intent inquiry is inclusive of whether a school board has acted affirmatively, not merely neutrally, to eliminate a dual system existing in 1954." App. 13c. The Tenth Circuit views affirmative desegregation of controlling importance. The trial court did not impose the burden on plaintiffs to show the presence of segregative intent. It decided the case by holding that "*defendants* have proven by a preponderance of the evidence that U.S.D. #501 is a unitary school system" [App. 14a (emphasis added)]--"a system in which the characteristics of the 1954 dual system either do not exist or, if they exist are not the result of past or present intentional segregative conduct of defendants or their predecessors." App. 8a. If there is concern that the trial court did not follow precedent regarding the burden of proof, remand for reconsideration, not remand for remedy, is the appropriate outcome.

The respondents also mischaracterize the ruling below when stating that the "district court ruled that Topeka's failure to desegregate was excused because, in the early 1950's, the school district adopted a neighborhood schools system." Res. Brief 4. The trial court did not excuse a failure to desegregate. It held that the schools are integrated and "free of the characteristics of *de jure* segregation." App. 57a. "[S]ubstantial integration" resulted from the adoption of the race neutral neighborhood school attendance system in the 1950's. App. 53a. After decisions of this Court "encouraged race-conscious efforts to eliminate vestiges of segregation and HEW challenged the progress of desegregation... additional action was then taken to improve racial balance." App. 53a-54a. The trial court "looked beyond the neighborhood school plan for segregative effect, thoroughly analyzing quantitative measures of racial composition." App. 72c.

C. The Court of Appeals did impose the burden upon the school district to achieve the "greatest possible degree of racial balance reasonably practical" (Petition 13-14), while giving only lip service to the essential role of causation. Petition 17-19. Even after this Court's decision in *Freeman v. Pitts*, 403 U.S. ___, 112 S.Ct. 1430 (1992), the Court of Appeals continued to reject the district court's correct approach as to the causal effect of demographic forces. App. 7e n.6, 10e. As noted by the dissent, this rejection of the demographic element was based upon the majority's "overinclusive definition of racial identifiability...and [imposition of] liability in the absence of racial balance, regardless of the showing made by the school district..." App. 9f.

II. REASONS FOR GRANTING THE WRIT

The respondents correctly concede that *Freeman* holds that there is "no duty to correct all racial imbalances without regard to cause." Res. Brief 11-12. Respondents are disingenuous, however, when arguing that the Court of Appeals adhered to this rule. Without doubt, the Court of Appeals does direct the district to cure all racial imbalances in Topeka schools, even though these imbalances were found by the district court not to have been caused by school board action or inaction.

This error is vividly evidenced by contrasting the trial court's and the Court of Appeals' discussions of the individual schools which are alleged to be racially identifiable vestige minority schools. For example, the district court found that the "increase of minority students at Belvoir was not caused by the school district." App. 33a. It noted that, when annexed in 1960, the school had an average or slightly above average minority population; that the minority population increased in the 1960's, after the construction of federally subsidized housing projects in close proximity to the school; and that minority population decreased through the 1981 closing of Rice School and the reassignment of students.[4] *Id.* The majority, however, imposed a duty upon the district to desegregate Belvoir without regard to the cause of its high minority population. App. 81b-82b.

The analysis with respect to Hudson is similar. Hudson was primarily white when built in annexed territory in 1963. *Id.* The minority student population

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[4] Further detail is found in the dissent. App. 136c-139c.

increased rapidly in the late 1960's and early 1970's with the construction of subsidized housing projects. App. 33a. A majority of the Court of Appeals identified Hudson as a high-minority school. App. 82b-83b. The dissent notes that "Hudson is perhaps the archetype for illustrating the court's refusal to consider the effect of demographic factors which result in changing student racial composition as various schools." App. 140c.

The contrasting findings regarding Lafayette further illustrate the point. Lafayette was an all-white school prior to the end of *de jure* segregation. App. 35a. Federally subsidized housing projects were built in the area in the early 1960's. App. 147c. Yet Lafayette is identified by the majority as a vestige minority school. App. 84b. The Tenth Circuit majority holds the defendant school district responsible for changes in student attendance which resulted from demographic forces independent of the schools.

The majority characterizes the defendants' experts, the district court, and the dissent as mistaken in their belief that "the changing demographics which resulted in unfavorable racial balances at various schools excuses the school board from achieving more acceptable racial balances." App. 65b. It states, "This view is clearly wrong where, as here, the school system is under an affirmative duty to dismantle a dual school system." *Id.* "The school district's excuse for the racial imbalance which exists today in Topeka's schools is that shifting residential patterns caused the problem. This is an unacceptable excuse when the school district has never fully dismantled the effects of the prior *de jure* segregation." App. 66b. The majority does not reject the dissent's analysis that "the increasing

minority percentages for these schools resulted from demographics, not from school board action." App. 81b. Rather, it holds that "a school district is not absolved by demographics from its affirmative duty to desegregate before it achieves unitariness." *Id.*

The Court of Appeals did not amend these findings when reconsidering the case following remand and direction to apply the rule of *Freeman*. Rather, the court continued to reject the district "court's conclusion that demographics caused segregation" (App. 8e n.6) and adhered to its position that the defendant district has the duty to correct racial imbalances caused by demographic forces occurring before achieving unitary status. *Id.*; see also App. 10e. In the view of the Tenth Circuit, racial imbalances caused by demographic forces outside the control of the district must be remedied unless racial balance has previously been achieved.[5]

Respondents fail to address issues other than causation. Respondents do not attempt to justify the outcome of requiring remedy of student assignment in Topeka, but not DeKalb County. Respondents do not attempt to justify the Tenth Circuit's view of the affirmative duty to achieve racial balance or the court's expanded scope of review. Respondents, like the Tenth Circuit, ignore the integrative actions of the district,

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[5] In addition, throughout the entire appellate history of this case, the courts and respondents have totally ignored the fact that there was not a finding of *de jure* segregation in the junior and senior high schools in 1954. The junior high schools had been desegregated in 1941, and in 1951 there was only one high school which was attended by all students without regard to race. App. 2a, 8a-9a. The imbalances in student population at the junior and senior highs in Topeka today are not vestiges. Clearly, the Tenth Circuit is imposing a duty upon the defendant district to achieve racial balance without regard to causation.

particularly the full implementation of HEW approved desegregation plans. As a result of those integrative plans, the school district closed five of nine junior high schools, transferred the ninth grade to the senior high schools, established six middle schools by the conversion of four junior high schools and the construction of two additional middle schools, closed six elementary schools, eliminated all remaining optional attendance zones, and reassigned nearly 200 faculty members. App. 14b, 50c-51c.

III. CONCLUSION

Petitioners pray that this Court accept review or, in the alternative, summarily reverse the Tenth Circuit and remand this case to the trial court for reconsideration in light of current conditions and this Court's decisions in *Freeman v. Pitts*, 112 S.Ct. at 1430 and *Board of Educ. v. Dowell*, 498 U.S. 237, 111 S.Ct. 630 (1991).

Respectfully submitted,

K. Gary Sebelius*
Anne Lamborn Baker
Wright, Henson,
Somers, Sebelius, Clark & Baker
100 E. 9th Street
PO Box 3555
Topeka KS 66601-3555
913/232-2200

Counsel for Petitioner

*Counsel of Record

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